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COVERING CASES REPORTED IN

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67 P.2d – 68 P.2d

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CALIFORNIA REPORTER

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67 PACIFIC REPORTER
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CAL.REP.67–68 P.2d—1

CITY AND COUNTY OF SAN FRANCISCO v. MARKET STREET R. CO.*

S. F. 14951.

Supreme Court of California.

April 7, 1937.

Rehearing Granted May 3, 1937.

1. Licenses ⇐1

"License" is a permit to do business which could not be done or to exercise a privilege which could not be exercised without the permit.

[Ed. Note.—For other definitions of "License," see Words & Phrases.]

2. Licenses ⇐3

License tax or fee may be imposed as condition of doing of business.

3. Licenses ⇐3

Additional license tax may be imposed for revenue purposes on business already licensed.

4. Licenses ⇐3

License may be required as police regulation.

5. Licenses ⇐3

License fee may be exacted, as in case of franchise, as compensation for granting of special privilege.

6. Licenses ⇐1

Term "license tax" as generally used, includes any charge on doing of a business and in a particular case the grant of power to make the exaction, the connection in which it is used, the substantive provisions of the taxing act, and the purpose of the charge determine its nature.

[Ed. Note.—For other definitions of "License Tax," see Words & Phrases.]

7. Street railroads ⇐24(3)

Under San Francisco charter authorizing the granting of franchises for street railways and the imposition of license taxes, city of San Francisco has power to exact a license tax from street railways, either for revenue or regulatory purposes.

8. Street railroads ⇐24(4)

Under Constitution authorizing gross receipts tax upon utilities to be in lieu of all other taxes and licenses except special privileges or franchises granted by municipality, city could not tax business of operating street railway or property used in operation of that business, but it could exact a charge in nature of rental for use of those portions of city streets covered by franchises of street railway (Const. art. 13, § 14, added in 1910).

9. Municipal corporations ⇐680(1)

Power of municipality to grant franchises is a delegated authority from the state, which may prescribe, and alter from time to time, the conditions on which grant shall be made.

10. Licenses ⇐7(1)

Generally license taxes for revenue only are municipal affairs and governed by general state law.

11. Licenses ⇐7(1)

License tax imposed by San Francisco on street railway which had paid a gross receipts tax based on each car in operation, which was a charge in the nature of rentals for the use of those portions of city streets covered by street railway franchises and not a tax on the business of operating the railway nor property used therein could be validly imposed under Constitution authorizing tax on gross receipts of utilities in lieu of all other taxes and licenses except special privileges or franchises granted by municipality (Const. art. 13, § 14, added in 1910).

In Bank.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by the City and County of San Francisco against the Market Street Railway Company. From a judgment in favor of the defendant, the plaintiff appeals.

Reversed and case remanded, with directions to enter judgment for plaintiff.

John J. O'Toole, City Atty., and Thomas P. Slevin, Deputy City Atty., both of San Francisco, for appellant.

William M. Abbott, K. W. Cannon, Cyrel Appel, and Ivores R. Dains, all of San Francisco, for respondent.

THOMPSON, Justice.

The City and County of San Francisco seeks by this action to recover $11,062.50 claimed as a license tax upon street cars operated by the defendant company between July 1, 1926, and September 30, 1927. There is no dispute as to the facts. It was stipulated that during that period the

*For subsequent opinion see 73 P.2d 234.

Market Street Railway Company operated 421 cars and that, if it were determined that the tax was due from the company, it should be calculated upon the basis of $15 per annum on each car in operation, payable quarterly. The city relies upon the various ordinances and orders granting the franchise under which the company operates and a general license tax ordinance applicable to franchises which did not contain a clause fixing the amount of the tax. The Market Street Railway Company resists the collection of the tax on the theory that, under section 14 of article 13 of the California Constitution and the appropriate sections of the Political Code, imposing upon street railways a franchise tax measured by gross receipts from operation, it was relieved from the payment of all license taxes to the city and county. The trial court granted the defendant company's motion for a nonsuit, and the plaintiff city and county appeals from the judgment in favor of the defendant.

Section 14 of article 13, which was added to the Constitution in 1910, provides that the tax upon the gross receipts of the name utilities "shall be in lieu of all other taxes and licenses, state, county and municipal, upon the property above enumerated (operative) of such companies except as otherwise in this section provided; *provided, that nothing herein shall be construed to release any such company from the payment of any amount agreed to be paid or required by law to be paid for any special privilege or franchise granted by any of the municipal authorities of this state.*" It is stipulated that the defendant company paid to the state the tax imposed by this section for the period under discussion, but the plaintiff municipality contends that the right to collect the license taxes referred to in the franchises and ordinances is saved to the city by the proviso quoted and italicized above. It is argued that the liability to pay the license tax is a contractual obligation, and that the license taxes are a part of the consideration for the franchises. The defendant takes the position that the license taxes were imposed upon the grantees of the franchise in the exercise of the taxing power of the state which was delegated by it to the municipality.

Up to January, 1900, when the charter of the City and County of San Francisco went into effect (St.1899, p. 241), franchises were granted under provisions of the general law. Section 497 of the Civil Code provided that the governing body of the city or city and county might grant franchises to street railways for not exceeding 50 years "under such restrictions and limitations, and upon such terms *and payment of license tax,* as the city, city and county, or town authority may provide." Section 508 of the Civil Code provided: "Each street railroad corporation *must* pay to the authorities of the city, town, county, or city and county, *as a license upon each car,* such sum as the authorities may fix, not exceeding fifty dollars per annum in the city of San Francisco, nor more than twenty-five dollars per annum in other cities or towns." Since 1893 the general law has contained the requirement, in some form or other, that the franchise shall be sold to the highest bidder. Stats.1893, p. 288; Stats.1897, p. 135, and the Broughton Act, Stats.1905, p. 777. The act of 1897 required the bid to be of a percentage of the gross annual receipts and the Broughton Act requires the annual payment to the city of 2 per cent. of the gross receipts after 5 years, in addition to a sale for the highest cash bid. The San Francisco charter, under which the franchises were granted after January 8, 1900, empowered the board of supervisors to grant franchises to construct and operate street railways for a term not to exceed 25 years, to the highest bidder, the bids to be of "a stated percentage of the gross annual receipts * * * arising from its use, operation, enjoyment, or possession" and to be at least 3 per cent. for the first 5 years, 4 per cent. for the next succeeding 10 years and 5 per cent. for the next succeeding 10 years. Article 2, chap. 2, § 6.

Article 2, chapter 2, § 1, subd. 15, of the charter empowered the board of supervisors "To impose license taxes and to provide for the collection thereof; but no license taxes shall be imposed upon any person who, at any fixed place of business in the city and county, sells or manufactures goods, wares or merchandise, except such as require permits from the board of police commissioners as provided in this charter."

The franchise orders and ordinances mentioned in the record, by authority of which the defendant operated its street railway, fall into three groups with reference to license tax provisions. The majority specify payment of an annual license tax on each car in operation which the city agrees not to increase. A second, but

smaller group, provides for payment of a license tax to be fixed by the board of supervisors, as provided by law or other similar general language, while the third group, slightly larger than the second, makes no mention at all of a license tax. With one or two exceptions, those franchises granted after 1889 appear to have provided for an annual payment to the city of 2 per cent. of the gross annual receipts, regardless of whether they also contained a provision for payment of a license tax. One at least, containing no reference to a license tax, was awarded to the highest cash bidder.

[1-6] A license is a permit to do business which could not be done or to exercise a privilege which could not be exercised without the permit. A license tax or fee may be imposed as a condition of the doing of the business. An additional license tax may be imposed for revenue purposes on a business already licensed. And a license may be required as a police regulation (City of Sonora v. Curtin, 137 Cal. 583, 585, 70 P. 674), or a license fee may be exacted, as in the case of a franchise, as compensation for the granting of a special privilege. (McQuillan, Municipal Corporations, vol. 3, § 1091, vol. 4, § 1772.) As generally used in statutes and opinions, the term "license tax" includes any charge on the doing of a business, and in a particular case the grant of power to make the exaction, the connection in which it is used, the substantive provisions of the taxing act and the purpose of the charge determine its nature. City of Sonora v. Curtin, supra; Ex parte Braun, 141 Cal. 204, 206, 74 P. 780; In re Johnson, 47 Cal.App. 465, 190 P. 852; John Rapp & Son v. Kiel, 159 Cal. 702, 708, 115 P. 651.

[7, 8] Under the charter provision quoted above, the city had power to exact a license tax either for revenue or regulatory purposes (John Rapp & Son v. Kiel, supra), and the state law required the payment by street railways of a license tax on each car. (Civ.Code, §§ 497 and 508.) There is no contention that the Civil Code provisions do not apply to the franchises under consideration. If the license tax was required to be paid as a part of the compensation for the special privilege of operating street railways, it is saved to the city by the proviso in section 14 of article 13 whether specifically mentioned in the franchise or not. Under that section the city may not tax the business of operating street railways nor the property used in the operation of that business, but it may exact a charge in the nature of rental for the use of those portions of the city streets covered by the defendant's franchises. Whether it has done so is our only concern here. The gross receipts charge under the Broughton Act has been held to be "neither a tax nor a license, but * * * obviously a toll or charge, which the holder of the franchise undertakes to pay as part of the consideration, for the privilege of using the avenues and highways occupied by the public utility, just as it obligates itself to pay the amount of its cash offer as the highest bidder for the franchise." County of Tulare v. City of Dinuba, 188 Cal. 664, 206 P. 983, 985. In California Jurisprudence the license tax required to be paid under section 508 of the Civil Code is classified with the payments under the Broughton Act. It is there said: "Furthermore municipalities are authorized to impose license taxes upon street cars, and to require a percentage of the gross receipts collected under a franchise as a toll or rental for the use of the streets." 23 Cal.Jur. 864.

[9-11] The power of the municipality to grant franchises is a delegated authority from the state, which may prescribe, and alter from time to time, the conditions upon which the grant shall be made. County of Tulare v. City of Dinuba, supra. Looking at the general law, the most reasonable interpretation of the statutes seems to be that the Legislature has by its various provisions attempted to prevent the granting of valuable privileges and franchises by a municipality without the exaction of a fair compensation for the use of the public property of which the municipality is the trustee. The payment of an annual fee per unit of property in operation in the exercise of the franchise is a recognized form in which to cast the requirement of compensation. See McQuillan, Municipal Corporations, vol. 4, § 1772, and authorities there cited. It is further reasonable to infer that with the passage of years the Legislature considered this an inaccurate measure of the value of the franchise bestowed and an inadequate price to pay for the privilege and so added the requirement of sale to the highest bidder, and later, payment of a percentage of the gross receipts realized from the exercise of the privilege. It is not argued by the defendant that the purpose of the license tax was police reg-

ulation, but its entire argument is that it was imposed for revenue only. This contention is out of line with the general rule that license taxes for revenue only are, in general, municipal affairs and governed by general state law. Trebilcox v. City of Sacramento, 91 Cal.App. 257, 266 P. 1015; Ex parte Braun, supra. The charge here considered is imposed by the state as a condition of granting the franchise. It is inconsistent with the principle that the power to raise its own revenue is an inherent attribute of a municipality. That it was intended to have some relation to the value of the privilege granted is apparent from the setting of a higher maximum rate for the City and County of San Francisco than for other cities and towns. Civ.Code, § 508. We conclude that the license tax in dispute is "an amount agreed to be paid or required by law to be paid for" a "special privilege or franchise granted by" a municipality within the meaning of the phrase as used in section 14 of article 13 of the Constitution, and hence the defendant is not exempted from its payment.

The judgment is therefore reversed, and the case remanded, with directions to enter judgment in favor of the plaintiff city and county for the amount of the tax as calculated in accordance with the stipulation of the parties.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; SEAWELL, J.; LANGDON, J.; EDMONDS, J.



8 Cal.2d 603

JONES v. RUTHERFORD.

S. F. 15611.

Supreme Court of California.

April 17, 1937.

Rehearing Denied May 17, 1937.

1. Champerty and maintenance ⇐5(1)

Where services rendered by attorney in connection with incorporation of town from which he was to obtain permit for operation of dog racing track consisted largely in overcoming opposition to incorporation of town and to race track, attorney *held* not barred from recovering alleged equal share of profits from dog racing activities on ground that such division would constitute splitting of fees for legal services with a layman.

2. Appeal and error ⇐1005(3)

Conflicts in evidence are to be resolved by jury and trial court.

3. Appeal and error ⇐1001(1)

Appellate court cannot reverse judgment where there is substantial evidence to support it.

4. Joint adventures ⇐8

Evidence *held* to justify judgment granting plaintiff one-half of stock issued to defendant's husband in connection with incorporation of association for promotion of dog racing on ground that he and plaintiff entered into agreement to share equally in any profits from their promotional activities.

5. Joint adventures ⇐5(1)

Fact that attorney claiming right to share with another in profits from promotion of dog racing enterprise obtained appointment as city attorney upon his representations that he was not interested in such enterprise *held* not to defeat his right to equal division of profits.

In Bank.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Suit by Samuel Jones against Crystal Rutherford. Judgment for plaintiff, and defendant appeals.

Affirmed.

Norman S. Manifee, of Redwood City, for appellant.

William P. Hubbard, of San Francisco, for respondent Jones.

Ralph W. Scott, of San Francisco, for respondent Rutherford.

Albert Mansfield, of Redwood City, for respondent California Pacific Title & Trust Co. and others.

SEAWELL, Justice.

Defendant Crystal Rutherford appeals from a judgment that plaintiff Samuel J. Jones have and recover 37½ shares of the corporate stock of San Mateo Greyhound Breeders' Association. Appellant claims to be the owner of said stock by virtue of a gift from her husband, Bruce H. Ruth-

erford. The corporation commissioner had given his consent to the release of said stock by defendant California Pacific Title & Trust Company, escrow holder, but it retained possession because of the conflicting claims thereto. Over the opposition of plaintiff the action was tried by a jury, which returned a general verdict for plaintiff upon which the judgment was entered. The court thereafter denied the motion of defendant Crystal Rutherford for a new trial.

It appears from the record that Bruce Rutherford, husband of appellant, and Samuel Jones, plaintiff herein, and an attorney at law, became interested in promoting a dog racing track near San Francisco. Plaintiff claims the stock which is the subject of this action by virtue of an agreement which he testified was made between him and Rutherford for equal division of whatever they should receive for promoting the dog racing track. Neither Rutherford nor Jones had funds to invest in the enterprise, but they planned to interest others in it.

An option on land in San Mateo county suitable for a dog racing track was taken in the name of Rutherford. One Martin and others associated with him were also interested in developing a dog racing enterprise. Rutherford and Jones were brought together with the Martin interest by one Haas. It was agreed that they should work together. Rutherford and Jones were to take steps to procure the incorporation of the town of Bayshore, in which the race track was to be located, and to obtain a permit from said town for the operation of the track. Martin and his associates were in contact with P. P. O'Connor and others who were in a position to finance the enterprise, and who subsequently incorporated the San Mateo Greyhound Breeders' Association. Thereafter the option on the race track site and the permit were assigned to the attorney for the association, which developed the property and operated a race track thereon.

In a contract of November 3, 1932, between Martin and O'Connor, to which Rutherford assented in writing, it was agreed that for services rendered 5 per cent. of the stock of the corporation to be formed should be issued to Martin and 5 per cent. to Rutherford. Rutherford subsequently gave directions that 37 of the 75 shares which constituted his five per cent. should be issued to one Collins, and 38 shares to his wife, the appellant herein. The shares issued in the name of the wife, which she claims as a gift from her husband, are the subject of the instant action. The jury and the trial court upheld plaintiff's contention that it had been agreed between him and Rutherford that money and property received for their promotional services should be divided equally between them, and by virtue thereof plaintiff was entitled to the stock which he claims herein.

Upon the trial plaintiff's testimony was corroborated by a number of disinterested witnesses, who testified to unequivocal statements made by Bruce Rutherford that he and plaintiff were to share equally in whatever was realized from their promotional activities.

Bruce Rutherford denied the existence of any such agreement. According to him, he employed Jones as his attorney to render legal services in connection with the promotion, on the understanding that Jones should receive $1,000 for such services, to be paid from funds to be derived from those who should be interested in the undertaking, and this sum had been paid.

[1] In an agreement drawn by Jones and executed in September, 1932, by Martin and Rutherford in the presence of Jones, it was provided that "legal expenses" of the incorporation of the town, not to exceed $1,000, should be paid by Martin. Plaintiff Jones was not a party to nor mentioned in said agreement. This agreement was superseded by the contract of November 3, 1932. Martin did in fact make payments totaling less than $1,000 to Rutherford and Jones at various times, which, according to Jones, were always divided equally between them. Appellant argues that if Jones' testimony of equal division is accepted, then it appears that he has been guilty of splitting a fee for legal services with Rutherford, a layman, which is contrary to public policy. It clearly appears that the promotional activities of Jones were both of a legal and nonlegal character. A large part of the activity of both men in the incorporation of the town, referred to in the agreement as "legal services," was not strictly legal work, but consisted in persuading the residents of the district that the town should be incorporated, in overcoming, through mass meetings and interviews, the opposi-

tion to the race track, and in other nonlegal activity. By an equal division of whatever was received Rutherford was compensated for his promotional services of a nonlegal character.

Appellant argues that if it was intended that Jones should have an interest in the stock which was the subject of the written agreements, Jones, who was a lawyer and had drafted the first agreement and was present when both agreements were executed, would have insisted that express provision be made for him. It appears that other persons than Martin were interested in the 5 per cent. of stock which Martin was to receive under the instrument of November 3, 1932, yet such persons were not named or referred to in the instrument.

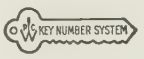
[2-4] Appellant also points to testimony of residents of the town of Bayshore that Jones was appointed city attorney of Bayshore at a salary of $25 a month upon his representation that he was not financially interested in the dog racing enterprise. Jones was unwilling to deny that he had made such statements. The court instructed the jury to take this evidence into consideration in passing on the credibility of Jones' testimony that an agreement for equal division existed. It was the province of the jury and the trial court to resolve conflicts in the evidence. As an appellate court we cannot reverse the judgment where there is substantial evidence to support it. The testimony of plaintiff Jones himself, and of the witnesses who testified on his behalf as to Rutherford's declarations that they were to share equally, sustains the judgment.

[5] If in fact Jones indicated to the townspeople that he was not financially interested in the dog racing enterprise when he was to be a stockholder, his conduct was wrongful as against them. But this is a collateral matter. It was not shown to be part of the contract between Jones and Rutherford that Jones should mislead the residents of Bayshore in any respect. Rutherford and his wife, as donee of the stock, cannot urge Jones' conduct in this connection to defeat Rutherford's liability on his agreement with Jones for equal division of the stock.

If there was any error in the admission of evidence, as contended by appellant, it was not sufficiently prejudicial to require a reversal. We find no error in the giving or refusing to give instructions.

The judgment is affirmed.

We concur: THOMPSON, J.; SHENK, J.; EDMONDS, J.; CURTIS, J.; LANGDON, J.



8 Cal.2d 608

In re ROSS.

L. A. 16032.

Supreme Court of California.

April 20, 1937.

1. Names ⇐20

Common law recognizes right to change one's personal name without necessity of legal proceedings and purpose of statutory procedure is simply to have, wherever possible, a record of the change (Code Civ.Proc. § 1275 et seq.).

2. Names ⇐20

Court to which application is made for a change of personal name should normally make its decree recording such change of name (Code Civ.Proc. § 1278).

3. Appeal and error ⇐949
Names ⇐20

Court to which application is made for change of personal name has discretion to deny application, but if discretion is abused, it is subject to correction on appeal (Code Civ.Proc. § 1278).

4. Names ⇐20

Stage and motion picture actor *held* entitled to change name to that which he used on stage and in motion picture work, and by which he was universally known, notwithstanding he had been adjudged a bankrupt, and had not thereafter paid debts discharged in bankruptcy proceeding, since in becoming bankrupt, he made use of a legal right to which no stigma nor disability attached (Code Civ.Proc. § 1278).

In Bank.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Proceeding in the matter of the application for change of name of Keith Macaulay Ross. From a decree denying the application for change of name, the petitioner appeals.

Judgment reversed with directions.

Prior opinion, 59 P.(2d) 439.

David Tannenbaum, of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, and Fred M. Cross, Deputy Co. Counsel, both of Los Angeles, for respondent.

LANGDON, Justice.

Petitioner filed a petition for change of personal name, under the provisions of section 1275 et seq. of the Code of Civil Procedure, in the superior court of Los Angeles county. The application stated that petitioner's name was Keith Macaulay Ross; that he was a stage and motion picture actor and for some fifteen years had used the professional name of Ian Keith; that the name of Ian Keith has great professional and sentimental value to him; that he is universally known by that name; and that he desired such name to be his true name, of record. A hearing was had in accordance with the statute at which proof was made of publication of the required order to show cause. No one appeared in opposition to the petition, but the court examined petitioner and found the above matters to be true. The court further found, however, that petitioner had been adjudicated a bankrupt in proceedings in New York, that his debts had been discharged, and that he had not subsequently paid such debts. The court thereupon denied the petition, and this appeal was brought by petitioner.

[1-3] The common law recognizes the right to change one's personal name without the necessity of legal proceedings, and the purpose of the statutory procedure is simply to have, wherever possible, a record of the change. Ray v. American Photo Player Co., 46 Cal.App. 311, 189 P. 130; Smith v. United States Casualty Co., 197 N.Y. 420, 90 N.E. 947, 26 L.R.A.(N.S.) 1167, 18 Ann.Cas. 701. Hence Mr. Ross may, regardless of the present petition, use the name of Keith if he desires. And in keeping with the object of the statute, a court to which he applies should normally make its decree recording such change of name. The statute provides in this connection: "On the hearing, the court may examine on oath any of the petitioners, remonstrants, or other persons, touching the application, and may make an order changing the name, or dismissing the application, as to the court may seem right and proper." Code Civ.Proc. § 1278. This provision permits the court in the exercise of its discretion to deny the application, but if such discretion is abused, it is, of course, subject to correction on appeal.

[4] The only reason which appears for the court's denial of the petition was that petitioner's debts had been discharged by bankruptcy, and that he had not thereafter paid them. We are unable to understand how this fact can constitute an objection to the decree sought. If it is urged that there is some guilt or impropriety in petitioner's conduct, the obvious answer is that bankruptcy statutes were designed to relieve the debtor of his obligations and enable him to make a fresh start. Stellwagen v. Clum, 245 U.S. 605, 617, 38 S.Ct. 215, 62 L.Ed. 507. In becoming a bankrupt, giving up all of his assets and being relieved of his obligations, petitioner made use of a legal right to which no stigma nor disability attaches. He is not obligated to pay the discharged debts, and to deny him any other legal right or privilege because of failure to do so is entirely unreasonable.

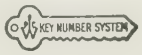
It is suggested, however, that since he became a bankrupt under the name of Ross, if the court granted the petition for change of his name to Keith, it would be assisting him to deceive persons who in future dealings might give him credit, which they would not do if they were aware of the fact of bankruptcy. There is no substance in this argument. Petitioner may now, without the aid of any court, deal with persons and secure credit under the name of Keith, if he chooses to assume that name. Creditors who investigate will be unable to find in the public records any indication of the bankruptcy of Keith. But if the decree is given, and a record appears of the change of name from Ross to Keith, creditors will be better enabled through the usual channels to discover the prior bankruptcy of Keith. Hence the granting of the present petition would probably operate to the benefit of future creditors, rather than to their detriment.

We do not mean to suggest that the lower court must in every case grant a peti-

tion in proper form for change of name, but it is our view that some substantial reason must exist for the denial, and that none appears in the record before us.

The judgment is reversed with directions to the trial court to grant the petition.

We concur: EDMONDS, J.; CURTIS, J.; SEAWELL, J.; SHENK, J.; THOMPSON, J.



8 Cal.2d 578

PERUMEAN et al. v. WILLS et al.

L. A. No. 15958.

Supreme Court of California.

April 9, 1937.

Rehearing Denied May 3, 1937.

1. Trial ⇐139(1)

Directed verdict is proper whenever, upon the whole evidence, judge would be compelled to set contrary verdict aside as unsupported by evidence.

2. Appeal and error ⇐1050(1)

In action against high school instructor and high school district for injuries student sustained in class in automobile mechanics when automobile, started while in reverse gear, pinned student against work bench, admitting evidence that schools in other cities and garages customarily did not block wheels when starting motors *held* not prejudicially erroneous, since evidence was competent on question of care and diligence.

3. Appeal and error ⇐1050(1)

Introduction of evidence, if erroneous, is not prejudicial, where like evidence has been received without objection.

4. Schools and school districts ⇐120

To fasten liability on school district, negligence of officer or employee of district must be alleged and proved, proof of negligence on part of student being insufficient, even where student is attempting to carry out directions of instructor.

5. Schools and school districts ⇐121

Wherever attempt is made to recover damages from school district for injuries from negligence on part of officer or employee of district, evidence must set forth facts clearly showing violation of duty of care imposed on school authorities.

6. Schools and school districts ⇐122

In action against high school instructor and high school district for injuries student sustained in class in automobile mechanics when automobile, started while in reverse gear, pinned student against work bench, directed verdict for instructor and district *held* proper, where rules requiring that wheel be blocked, emergency brake be set, and gear shift lever put in neutral, before engine was started were frequently repeated, but were violated by another and experienced student while such student was not under scrutiny of instructor.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Barouk Perumean, a minor, by his guardian ad litem, Edward Perumean, and another, against George M. Wills and others. From judgments in favor of defendant Los Angeles City High School District and defendant Samuel Leonard Fick, plaintiffs appeal.

Affirmed.

For prior opinion, see 57 P.(2d) 554.

Rehearing denied; SEAWELL, J., dissenting.

Gerald Willis Myers and L. V. Meloy, both of Los Angeles, for appellants.

Everett W. Mattoon, Co. Counsel, and Ernest Purdum, Deputy Co. Counsel, both of Los Angeles, for respondents.

THOMPSON, Justice.

A hearing was granted in this cause after decision by the District Court of Appeal, in order that we might give further consideration to the question of whether there was any substantial evidence of negligence on the part of the employee of the respondent school district. The following is taken from the opinion rendered by the District Court of Appeal:

"Plaintiffs have appealed from judgments entered upon verdicts rendered by a jury in favor of Los Angeles City High School District and Samuel Leonard Fick, an instructor in George Washington High School, in an action wherein plaintiffs, Barouk Perumean, a minor, and his father, Edward Perumean, sought damages for injuries suffered by the minor while attending a class in automobile mechanics. They

have also appealed from an order of the trial court denying a motion for new trial as to the above-named respondents.

"'The injury happened,' according to respondents' brief, 'as the direct result of the act of a fellow pupil, George M. Wills. George Wills had been working in the auto shop under the instruction of the defendant, Samuel Fick, for approximately two years before this accident. He had been a good student in the shop, he had his own driver's license and drove his own car. Mr. Fick had taught auto shop for some nine years without any accidents, and had worked as a mechanic and operated his own garage an additional twelve years. On the particular occasion George Wills had been directed by Mr. Fick to adjust the valve tappets on the Buick automobile which had been brought in that morning for repairs. The automobile was first placed near the door at the end of the shop and was examined there by Mr. Fick. George Wills started the motor with Mr. Fick's permission and listened to the tappets to see how much work would be required to adjust them. In order to use the space where the car was standing for another purpose Mr. Fick directed George Wills to put the car on a jack and move it over near the work benches. After the car was moved to that position the motor was again started by George Wills and he ran it for about five minutes to warm up the engine, then turned off the motor and went into the adjacent tool room for certain wrenches. On his return to the automobile he turned on the switch and, standing on the floor of the garage, opened the door and leaned into the front compartment and pressed his hand upon the starter button. In some manner the gear-shift lever had been shoved into reverse position so that the gears of the car were engaged and when the engine started the car moved rapidly backward against the plaintiff Perumean and pinned him against the work bench at which he had been working. Realizing what had happened, George Wills sprang into the driver's seat and drew the car forward, releasing the plaintiff. In the meantime, Mr. Fick, who had been engaged in giving instructions to another pupil in a different part of the shop room, had heard the commotion and ran to the assistance of the plaintiff.'

"The Buick car upon which work was being done belonged to Samuel Brown, father of a student, who brought it to the auto shop of the school for repairs. As owner of the car, he was made a defendant in this action, but a nonsuit was granted as to him by the trial court, the same action being taken as to Mr. and Mrs. George N. Wills, parents of George M. Wills, also original defendants. After remaining defendants had put on their testimony and the evidence was closed, the court, upon motion, directed the jury to return verdicts in favor of the High School District and the instructor, Mr. Fick, which directions were followed, the jury at the same time rendering its verdict in favor of the minor, George M. Wills.

"Later, the trial court denied a motion for a new trial as to the School District and the instructor, but granted such a motion as to the minor and his parents.

"The appellants contend that the court erred in ordering the directed verdicts, also in admitting testimony as to the practice prevailing in various other schools * * * in regard to placing blocks under cars before starting a motor. Error is also predicated upon the court's order denying motion for a new trial as to the School District and the instructor.

[1] "In considering the objection to the directed verdicts, we turn to the In re Estate of Baldwin, 162 Cal. 471, 473, 123 P. 267, 268, and find the rule set out as follows: 'A directed verdict is proper, unless there be substantial evidence tending to prove in favor of plaintiff all the controverted facts necessary to establish his case. In other words, a directed verdict is proper whenever, upon the whole evidence, the judge would be compelled to set a contrary verdict aside as unsupported by the evidence. To warrant a court in directing a verdict, it is not necessary that there should be an absence of conflict in the evidence; but [to deprive the court of the right to exercise this power], if there be a conflict, it must not be a substantial one.' (Citing cases.) As stated many years ago in County Com'rs [of Marion County] v. Clark, 94 U.S. 278, 284, 24 L.Ed. 59, 62, '* * * before the evidence is left to the jury, there is or may be in every case a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.' That the trial judge was cognizant of these principles appears from his comment at the time he directed

the verdicts: 'I am convinced that there was no negligence on the part of Mr. Fick, therefore not [none] on the part of the School District.' If there were any evidence of negligence on the part of Mr. Fick, which the jury might have concluded was the proximate cause of the student's injury, then error was committed by the trial court.

"Shortly before the accident, the minor plaintiff had been instructed by Mr. Fick to repair a radiator, and to perform that work, was directed to go to a soldering bench running from east to west along the north wall of the shop room where the class was conducted. A safety line was marked on the floor parallel with this bench and five feet away from it. The Buick was backed up to this line, but there was no barrier between it and the boy, as he stood at the bench. Mr. Fick testified that the boys had been instructed, before starting any automobile, to examine it to see whether it was in gear, that motors must be checked by the instructor when first started, and that the car should be blocked. Blocks 6 inches by 6 inches and approximately 10 inches long were provided for the purpose. One of the students attending the class with the minor plaintiff and minor defendant testified that in addition to the precautions mentioned above, the boys had been instructed to see if the hand brake was set. The minor Wills testified that he had received all these instructions, but 'I do not know on this occasion whether or not the hand brake was set on the automobile as I did not test it and I did not block the wheels nor do I know whether or not the wheels were blocked.' Under cross-examination, Mr. Fick testified as follows concerning blocks:

"'Q. And you never made any inspection of that car to see whether it was blocked, or whether any safety precautions were taken, did you? A. I saw the car sitting there, and I gave him permission to start it; I saw him start it, it was all right, I went over across the shop to instruct these other students; came back again, the car had been started, and that is what happened.

"'Q. The blocks were not on the car, were they? A. The blocks were not on the car at the time?

"'Q. Yes. A. I couldn't say whether they were or not. I don't believe they were.

"'Q. You didn't make an examination of the car at all to see whether the blocks were there at all at the time it was first started, did you? A. I was there, I don't remember whether I checked that or not, I don't believe they were on either.'"

[2] With reference to the claim that it was negligence on the part of the instructor not to observe whether blocks were behind the wheels before the motor was started, the defendants introduced testimony to the effect that other auto shops in schools in and around Los Angeles did not require the wheels to be blocked, and that it was not customary to block the wheels. Some of this testimony was admitted without objection and some was admitted over plaintiff's objection. The suggestion has been advanced that evidence with respect to trade garages was received, but a close study of the bill of exceptions shows otherwise and discloses that the specifications of error only relate to the custom existing in other schools. We cannot sustain the claim of appellants that the reception of this evidence was prejudicially erroneous. In the first place, testimony as to the general custom and practice of other auto shops in schools was competent on the question of care and diligence exercised by those charged with a lack thereof in the instant case. Burns v. Sennett & Miller, 99 Cal. 363, 373, 33 P. 916; Hennesey v. Bingham, 125 Cal. 627, 635, 58 P. 200; Longuy v. La Societe Francaise, 52 Cal.App. 370, 375, 198 P. 1011; and Thomas v. Southern Pacific Co., 116 Cal.App. 126, 131, 2 P.(2d) 544.

[3] Even if we assumed the introduction of such evidence to be erroneous, we should feel compelled to hold that it was not prejudicial because like evidence was received without objection. The testimony received over objection being merely cumulative of that which was admitted without objection, it is difficult to see how appellants could have been injured.

[4, 5] Passing to the question of whether there was substantial evidence touching the liability of the respondent student which should have been submitted to the jury, we must first observe that it is now well settled that in order to fasten liability upon the school district negligence on the part of an officer or employee of the district must be alleged and proved. It is not sufficient to prove negligence on the part of a student, even when the student is attempting to carry out the directions of an instructor. Ellis v. Burns Valley School

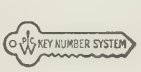
Dist., 128 Cal.App. 550, 18 P.(2d) 79; Hack v. Sacramento City Junior College Dist., 131 Cal.App. 444, 448, 21 P.(2d) 477; Underhill v. Alameda E. School Dist., 133 Cal. App. 733, 24 P.(2d) 849, 851; McCloy v. Huntington Park Union H. S. Dist., 139 Cal.App. 237, 33 P.(2d) 882; Goodman v. Pasadena City H. S. Dist., 4 Cal.App.(2d) 65, 68, 40 P.(2d) 854. After commenting upon the liability imposed by the act and duties of school authorities, it was said in Underhill v. Alameda E. School Dist., supra: "With the foregoing observations in mind, we believe that, whenever an attempt is made to recover damages from a school district for such injuries, the complaint in the action must set forth facts clearly showing a violation of a duty of care imposed upon the school authorities." A like observation may be made when considering the sufficiency of the evidence.

[6] We may therefore consider whether there was substantial evidence of negligence on the part of Fick—the instructor. It is urged that "the school teacher and the Los Angeles City High School District were negligent in failing to carry out their own rules and regulations, as to safety in the conduct of said class." As we have already indicated, the rules required students to see that the emergency brake was set, the gear shift lever in neutral, and the wheels blocked, before a motor was started. These instructions were repeated frequently during the school term. It is hardly necessary to note that the instructor did not himself violate any of these rules. The student George Wills did, it is true. Can negligence be predicated upon the theory that Fick did not keep Wills under closer scrutiny and observe his failure to comply with the rules? The uncontradicted evidence discloses that there were twenty-six or seven pupils in the shop on the day of the accident; that Wills had been a student in the shop for two years and was a good pupil; that he drove his own car; had a driver's license; and had never been seen by the instructor taking any chances. With the duty resting upon the instructor to supervise all of the pupils, can it reasonably be said that Fick was guilty of negligence because he did not examine the car every time George Wills started the motor? We think that reasonable minds cannot differ upon the question and that the answer must be in the negative. The directed verdict was therefore proper.

The appeal from order denying motions for new trial as to respondents Los Angeles High School District and Samuel Leonard Fick, being unauthorized (Gray v. Cotton, 174 Cal. 256, 162 P. 1019; Williams Co. v. Quin, 44 Cal.App. 296, 186 P. 401; United Casting Co. v. Duncan, 44 Cal.App. 384, 186 P. 403), is ordered dismissed.

The judgments are affirmed.

We concur: SHENK, J.; LANGDON, J.; EDMONDS, J.; CURTIS, J.



8 Cal.2d 592

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. HUNTER.

S. F. 15767.

Supreme Court of California.

April 13, 1937.

1. Limitation of actions ⇐148(3)

Financial statements signed by guarantor of note on which action was not brought within four years of due date of note which guaranty had partly secured *held* unequivocal acknowledgment of liability under guaranty, taking obligation out of statute of limitations (Code Civ.Proc. § 360, and § 337, subd. 1, as amended by St.1933, p. 2116).

2. Limitation of actions ⇐148(3)

That guarantor's obligation to pay part of note was only contingent did not render her acknowledgment of liability contingent so as to render obligation insufficient upon which to base implied promise to pay, where acknowledgment was not coupled with condition or restriction, notwithstanding guarantor was unwilling to give payee all security payee had requested.

3. Guaranty ⇐59

That payee received from sale of security more than amount of note of which defendant was guarantor did not satisfy terms of guaranty so as to release defendant, where guaranty was continuing and provided that it should remain operative until all present or future credits given by payee, not exceeding limited sum, should be paid.

4. Guaranty ⇐38(1)

Guaranty executed after notes and which provided that it should constitute a continuing guaranty in reference to original credit, including all future liabilities of makers, *held* not limited to future indebtedness.

5. Limitation of actions ⇐24(2)

That action on guaranty was not commenced within three months from sale under trust deed securing note, as required by statute, did not bar action, since proviso added to statute prescribing four-year limitation for commencement of actions founded on writing requiring action for balance due upon obligation secured by trust deed or mortgage to be brought within three months after sale was intended to prescribe time within which action for deficiency judgment must be commenced, and has no application to action based on independent obligation of guarantor (Code Civ.Proc. § 337, subd. 1, as amended by St.1933, p. 2116).

In Bank.

Appeal from Superior Court, Monterey County, H. G. Jorgensen, Judge.

Action by the Bank of America National Trust & Savings Association against Mary A. Hunter. From a judgment of nonsuit, plaintiff appeals.

Reversed and remanded for further proceedings.

Prior opinion, 60 P.(2d) 328.

Rosendale, Scott & Thomas, of Salinas, and Louis Ferrari, Tobias J. Bricca, and C. H. White, all of San Francisco, for appellant.

Garth V. Lacey and Albert E. Warth, both of Salinas, for respondent.

WASTE, Chief Justice.

A hearing was granted herein after decision in the District Court of Appeal of the First Appellate District, Division 1, in order that we might more fully consider the applicability or nonapplicability to this cause of the proviso added to subdivision 1 of section 337 of the Code of Civil Procedure in 1933 (Stats.1933, p. 2116). Our examination of the subject satisfies us that the District Court of Appeal, along with correctly disposing of other issues, properly concluded that said proviso, dealing with limitations of actions, furnishes no obstacle to the prosecution of the present action. We are not, however, in complete accord with everything stated by that court on the point, but shall hereinafter specify the reasons which, in our opinion, indubitably indicate that the proviso is without application here.

We adopt the following portions of the opinion of the District Court of Appeal, with such additional comments as will later appear, as and for the opinion of this court:

"This action was brought to recover the sum of $4,300, upon a guaranty in this amount, executed by the defendant in favor of Bank of Italy National Trust and Savings Association, of which the plaintiff is the successor, and by which she guaranteed to that extent payment of a promissory note for $10,800 executed contemporaneously therewith by Sheldon B. Hunter, Zella L. Hunter, Samuel P. Hunter and Ethel M. Hunter in favor of said bank. The note was secured by a deed of trust upon real property, and not being paid when past due proceedings were taken to sell the land. It was bid in by the plaintiff and the amount of the bid applied on the indebtedness, which had been increased by unpaid interest and the expenses of the sale, after which application there yet remained due to the plaintiff a sum equal to the amount of the guaranty, which upon demand the defendant failed to pay.

"On the trial, at the conclusion of the evidence, the defendant moved for a nonsuit upon the grounds (1) that the demand was barred by the provisions of section 337 of the Code of Civil Procedure because the action was not brought within four years of the due date of the note which the guaranty partly secured, nor within three months from the time of the sale under the deed of trust securing the note; (2) that the evidence showed that a sum of more than the amount of the guaranty had as the result of the sale been credited upon the note, thus satisfying the terms of the guaranty; (3) that the guaranty was given for future advances and that the evidence failed to show that the execution of the promissory note was subsequent to that of the guaranty. This motion was granted by the court, its order being general without specification of any particular ground therefor. The plaintiff appeals from the judgment entered thereon, bringing here for review the correctness of said order.

"1. As to the statute of limitations. The record discloses that the action was com-

menced more than four years after the maturity of the note; but in this connection the appellant contends that the statute was repeatedly tolled by acknowledgments by defendant in writing of the debt of a character sufficient under the terms of section 360 of the Code of Civil Procedure to afford evidence of a continuing obligation.

"These acknowledgments are found in two so-called 'financial statements' signed by the defendant and furnished by her to the plaintiff, and in correspondence between them. One of these statements was given on December 1, 1931, and includes the following language: 'The undersigned, for the purpose of establishing and procuring credit from time to time with you and to induce you to permit the undersigned to become indebted to you * * * furnishes the following as being a true and correct statement of the financial condition of the undersigned on the above date. * * * Contingent liability as guarantor S. P. Hunter $4,300.' The other of such statements was furnished on November 30, 1932, and contains the same language with the exception that the sum named as a contingent liability is $4,575; and the evidence shows that each of these amounts included the indebtedness covered by the guaranty.

"With regard to the correspondence the record shows that the plaintiff through its local manager wrote several letters to the defendant, requesting her to do something about her liability on the guaranty in order to avoid a threatened sale of the real property covered by said deed of trust. In reply to one of these letters she wrote: 'I understood we had another month to try to sell the ranch. * * * I will appreciate anything you can do to assist me in this matter very much. * * * Please do all you can to help me at this time.'

"On August 7, 1933, the manager again wrote to the defendant saying: 'If you are not in a position to pay this amount at the present time we will be willing to take a note from you in that amount plus the commercial account you now owe us. Both amounts will be secured by a deed of trust on your ranch property;' to which the defendant replied: 'I am not willing to give you a trust deed on the ranch as security for $8,300. You know that the ranch is worth much more than that amount, and if I should be unable to meet interest I would stand a chance to lose the entire ranch. I will give the bank a mortgage on enough of the land to give the bank the margin of security which it requires for $8,300.'

[1] "We are of the opinion that these financial statements and the defendant's reply to the bank's letter of August 7 constitute unequivocal acknowledgements of liability under her guaranty, from which the law implies a promise to pay. Searles v. Gonzalez, 191 Cal. 426, 430, 216 P. 1003, 28 A.L.R. 78; Curtis v. Holee, 184 Cal. 726, 195 P. 395, 18 A.L.R. 1024; Foster v. Bowles, 138 Cal. 346, 71 P. 494; Weatherwax v. Hills, 113 Cal.App. 557, 298 P. 853; Maurer v. Bernardo, 118 Cal.App. 290, 5 P.(2d) 36.

[2] "The respondent suggests that the obligation being only contingent, her acknowledgment of liability was therefore contingent, and therefore not sufficient upon which to base an implied promise to pay. This is to confuse the obligation with the acknowledgment of liability. The latter, as appears from our reference to the evidence, was not coupled with any condition or restriction. Nor did the fact that the defendant was unwilling to give the bank all the security it asked affect the clear-cut character of the acknowledgment. * * *

[3] "The next ground of the motion was that the evidence showed that a sum of more than $4,300 had been received by the plaintiff from the sale of the security and credited upon the note, thus satisfying the terms of the guaranty.

"In making this contention the respondent ignores the language of the guaranty, which reads in part: 'And this guaranty shall remain and be operative until all present or future credits given by you as aforesaid, not exceeding said limited sum, shall be fully paid * * * and agrees to pay you at any time upon demand * * * the full amount of principal and interest due * * * as aforesaid, not exceeding the sum of $4,300.' As is said in 81 A.L.R. at page 792, subdivision c, 'A continuing guaranty, which contains a limitation as to the amount for which the guarantor will be bound, is not exhausted though the principal contracts and pays debts equal to or greater than the sum stipulated therein.'

[4] "The third ground of the motion for nonsuit was that the guaranty was given for future advances only, and that the evidence fails to show that the execution of the promissory note was subsequent to that of the guaranty.

"This contention, again, ignores the language of the instrument, and also the undisputed evidence in the case. That language is: 'Please give credit to, and permit S. B. Hunter and S. P. Hunter to become indebted to you on notes, endorsements, overdrafts, acceptances or other liabilities, in a sum not exceeding forty-three hundred dollars ($4,300.00). And as said S. B. Hunter and S. P. Hunter contemplate a course of future dealings with you, please continue said credit, etc. * * * And these presents shall be deemed to be and shall constitute to you a continuing guaranty in reference to the original credit hereby authorized and guaranteed, and shall embrace all future liabilities of said S. B. Hunter and S. P. Hunter to you under such original credit. * * * And this guaranty shall remain and be operative until all present or future credit * * * shall be fully paid.'

"The undisputed evidence shows that at the time of the execution of the guaranty S. B. and S. P. Hunter were indebted to the plaintiff on two notes, one for $6,500 and the other for $4,300, which last was also signed by the defendant. By the present transaction those two persons executed one note for the combined amount, and the bank, in order to continue in force the defendant's liability theretofore existing on the $4,300 note, proposed or required that she execute a guaranty of the new note in the identical amount, which she did in the form of the instrument in suit. Nothing could be plainer than that it was not limited to future indebtedness."

[5] Section 337 of the Code of Civil Procedure, which prescribes a four-year limitation for the commencement of actions founded on a writing, is relied upon by the defendant as a bar to the action because of the 1933 amendment thereof which added a proviso in the following words: "provided that the time within which any action for a money judgment for the balance due upon an obligation for the payment of which a deed of trust or mortgage with power of sale upon real property or any interest therein was given as security, following the exercise of the power of sale in such deed of trust or mortgage, may be brought shall not extend beyond three months after the time of sale under such deed of trust or mortgage." The claim of the defendant in this regard is based upon the fact that the present action was not commenced until after the lapse of three months from the sale under the deed of trust.

In our opinion an action against a guarantor, such as the defendant herein, does not fall within the terms of the quoted portion of section 337, supra. When that section speaks of an action to recover "the balance due upon an obligation for the payment of which a deed of trust or mortgage with power of sale upon real property or any interest therein was given as security, following the exercise of the power of sale in such deed of trust or mortgage," it refers to the balance due upon the principal or secured obligation which is ordinarily recoverable by way of action for a deficiency judgment. This conclusion is supported by the fact that section 580a of the Code of Civil Procedure, dealing with deficiency judgments after sales under deeds of trust or mortgages, was added to the Code in 1933 (St.1933, p. 1672) at the same session of the Legislature at which section 337, supra, dealing with limitations of actions, was amended by adding thereto the above quoted proviso which gives rise to the issue now under consideration. A reading of section 580a, supra, as added in 1933, discloses that its provisions have to do solely with actions for recovery of deficiency judgments on the principal obligation after sale under trust deed or mortgage, as distinguished from a guarantor's obligation such as is here involved. Section 580a, supra, reads in part:

"Complaint in action for deficiency judgment. Whenever a money judgment is sought for the balance due upon an obligation for the payment of which a deed of trust or mortgage with power of sale upon real property or any interest therein was given as security, following the exercise of the power of sale in such deed of trust or mortgage, the plaintiff shall set forth in his complaint. * * *

"Limitation of actions. Any such action [for a deficiency judgment on the principal obligation] must be brought within three months of the time of sale under such deed of trust or mortgage."

It is immediately apparent that the descriptive language and the time limitation contained in section 580a, supra, which section deals exclusively with actions for recovery of deficiency judgments, are identical with the descriptive language and the time limitation appearing in the proviso added by the same Legislature to section

337, supra, which latter section deals with limitations of actions. With the addition of the former section (580a) to the Code, it was indispensable that a proviso be added to the latter section (337) in order to assure consistency between the two sections, thus conclusively establishing, in our opinion, that the proviso added to section 337 in 1933 was intended to, and does, prescribe the time within which an action for a deficiency judgment must be commenced and, contrary to the defendant's contention, has no application to an action of this character based on the independent obligation of a guarantor.

The judgment is reversed and the cause remanded to the superior court for further proceedings in accordance with the views herein expressed.

We concur: THOMPSON, J.; SHENK, J.; CURTIS, J.; SEAWELL, J.



8 Cal.2d 585

AMERICAN MOTORISTS INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 15764.

Supreme Court of California.

April 13, 1937.

Rehearing Denied May 13, 1937.

1. Workmen's compensation ⇐1432

Evidence *held* to sustain finding that firm of contractors was "special employer" and liable to employee for compensation for injuries, where members of firm worked for corporation purportedly as individuals, one member employed the employee, and employee received most of his instructions from members of firm.

2. Workmen's compensation ⇐1194, 1771

Employee may proceed against either special or general employer or both of them, and, having chosen to seek awards against both is entitled to an award against each, jointly and severally, for full benefit allowed by act.

3. Workmen's compensation ⇐1072

Employee who sought awards against both general and special employers *held* entitled to award against their insurance carriers, jointly and severally, though premium was paid only to insurance carrier of general employer to cover liability for employee, rights of insurance carriers as between themselves being a matter for independent suit.

In Bank.

Proceeding under the Workmen's Compensation Act by George W. Suytar, claimant, against the United Concrete Pipe Corporation, employer, and its insurance carrier, the Hartford Accident & Indemnity Company, and against Hall Bros., employer, and its insurance carrier, the American Motorists Insurance Company. To review an award of the Industrial Accident Commission in favor of the employee, the American Motorists Insurance Company petitions for writ of review.

Affirmed.

Willis I. Morrison, of Los Angeles, for petitioners.

Everett A. Corten and Emmet J. Seawell, both of San Francisco, for respondents.

PER CURIAM.

This is a proceeding to review an award of the Industrial Accident Commission. The applicant, George W. Suytar, was injured in the course of his employment and was given an award. United Concrete Pipe Corporation, hereinafter called United Corporation, his general employer, and its insurance carrier, Hartford Accident & Indemnity Company, were clearly liable therefor. The question is, however, whether the firm of Hall Bros. and petitioner, its insurance carrier, are also liable on the theory of special employment. The commission found that the United Corporation was a general employer and Hall Bros. a special employer and made its award jointly against both.

The essential facts are simple. The United Corporation entered into a contract to perform certain road work, a Federal Public Works Administration project. Contractors were required to be licensed, and to qualify by posting bond, and could employ labor only through the office of the national re-employment service. Hall Bros., a firm consisting of M. A. Hall and J. H. Hall, did business as independent contractors and proposed to United Corporation to furnish labor and materials for

part of the job at a contract price. There is some uncertainty as to whether this proposal resulted in a contract but, whether it did or not, the two Hall brothers were not licensed nor otherwise qualified to do PWA work and therefore were not carried on the records of the employment service as employees of United Corporation, M. A. Hall being designated as working foreman, and J. H. Hall as carpenter and concrete worker. Suytar, the injured employee, who had previously worked for Hall Bros., asked J. H. Hall for a job and, after securing his employment card from the service, was put to work. He testified that he received most of his instructions from the two Hall brothers, but was also directed by E. I. Mosher, job superintendent of United Corporation. Although the Halls were listed on the United Corporation pay rolls as employees, actually their checks were not delivered to them, but at the end of the job a settlement was reached according to the original proposal by them to do the work as subcontractors.

[1] From the above it would appear that the commission was justified in concluding that while United Corporation was the general employer of Suytar, the firm of Hall Bros. was a special employer and liable as such. But this simple conclusion does not dispose of the case before us, which presents another problem due to its special facts. It appears that United Corporation carried workmen's compensation insurance with Hartford Accident & Indemnity Company and in its pay roll reports included the name of Suytar, the injured employee, so that its premium was paid in such amount as to cover liability for him. On the other hand, while Hall Bros. carried a policy of compensation insurance with petitioner, Suytar was not included in any pay roll report and no premium was charged or paid to cover work on this job. On the contrary, it was agreed that United Corporation was to retain, out of the amount due Hall Bros., an amount sufficient to cover compensation insurance on the "men working under their charge." It appears that these sums were actually retained by United Corporation and paid to its insurance carrier, Hartford Accident & Indemnity Company.

The case of Federal Mutual Liability Ins. Co. v. Industrial Accident Comm., 190 Cal. 97, 210 P. 628, is closely in point. There was in that case also a general and special employment with an agreement that the employee injured should be carried on the pay roll of the general employer for purposes of computing compensation insurance premiums. The general employer was reimbursed by the special employer for wages and premiums paid on account of men working for the special employer. It was there held that, notwithstanding the admitted joint employment, the commission properly awarded compensation only against the insurer who received the premiums, for the reason that the parties intended the general employer to be liable for compensation to men hired under the agreement and the general employer recognized its liability and insured against it.

[2, 3] Since both employers are discharged, as between insurance companies, equity and fair dealing certainly demand that payment be made by the company which received the premium for the coverage. But that is a matter to be settled between the insurance carriers, if necessary in an independent suit. The Workmen's Compensation Act (St.1917, p. 831, as amended) imposes upon special and general employers a joint and several obligation [Diamond D., etc., Co. v. Industrial Acc. Comm., 199 Cal. 694, 250 P. 862; Famous Players, Etc., Corporation v. Industrial Acc. Comm., 194 Cal. 134, 228 P. 5, 34 A.L.R. 765; Department of Water & Power v. Industrial Acc. Comm., 220 Cal. 638, 32 P.(2d) 354] and the employee may proceed against either or both of them and, having chosen to seek awards against both, he is entitled to an award against each, jointly and severally, for the full benefit allowed him by the act. [Standard Acc. Ins. Co. v. Industrial Acc. Comm., 123 Cal.App. 443, 11 P.(2d) 401]. Whatever may be the equities between the employers and their insurance carriers, we think it would be against the policy of the compensation act, and contrary to its spirit and intent, to allow an agreement between joint obligors to diminish the remedy of the employee. Despite any agreement between themselves as to which of them shall bear the burden of their liability, the employers are jointly and severally liable to the employee and the award was properly made against both. In so far as the case of Federal Mutual Liability Co. v. Industrial Acc. Comm., 190 Cal. 97, 210 P. 628, is inconsistent herewith it is overruled.

The award is affirmed.

8 Cal.2d 589

HARTFORD ACCIDENT & INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

S. F. 15765.

Supreme Court of California.

April 13, 1937.

1. Workmen's compensation ⇐1072

Where injured employee proceeded against both general and special employer, Industrial Commission properly gave employee an award against general employer's insurance carrier, but improperly discharged special employer's compensation carrier.

2. Workmen's compensation ⇐1838

One employer cannot object if injured employee does not proceed against second employer who is jointly and severally liable with him, but where both employers are brought before Industrial Commission and award erroneously discharges one instead of making joint and several award against both, employer against whom awards were made can object to discharge of other employer, since relative rights of employers may be affected by determination that only one of them is responsible for compensation for employee.

3. Workmen's compensation ⇐1789

Erroneous discharge by award of Industrial Accident Commission of an employer who has joint and several obligation to pay compensation is a determination by a competent tribunal that obligation is not joint, which if not operative as res judicata in a subsequent suit between employers or insurers for contribution or reimbursement, would at least be competent evidence.

4. Workmen's compensation ⇐1838

Where Industrial Accident Commission made a joint award against both general and special employer, insurance carrier of general employer *held* entitled to object to discharge of compensation carrier of special employer.

In Bank.

Proceeding under the Workmen's Compensation Act by Louis Maggiora, claimant, against Vincent Maggiora, general employer, and the State Compensation Insurance Fund and against John A. Roebling's Sons Company, special employer, and the Hartford Accident & Indemnity Company, insurance carrier. From that portion of the award which discharged the State Compensation Insurance Fund, the Hartford Accident & Indemnity Company petitions for writ of review.

Portion of award appealed from annulled and proceeding remanded with directions.

Jesse H. Steinhart and John J. Goldberg, both of San Francisco, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

THOMPSON, Justice.

This is a proceeding to review an award of the Industrial Accident Commission. The commission found that Louis Maggiora sustained injury arising out of and occurring in the course of employment by his brother, Vincent Maggiora, as general employer and by John A. Roebling's Sons Company as special employer; that the general employer's compensation carrier was the petitioner Hartford Accident & Indemnity Company "which received the premium upon the payroll of said employer for the service in the course of performance of which said injury was sustained"; that the special employer's compensation carrier was the State Compensation Insurance Fund; and that the injured employee's pay was not included on the special employer's pay roll for computation of insurance premium, nor was a premium paid thereon by the special employer to its insurance carrier. The commission therefore assessed the entire compensation liability against the petitioning insurance carrier of the general employer. The award was made against petitioner alone and both employers and the State Compensation Insurance Fund were discharged.

Petitioner contends that the findings do not support the award against it, since the evidence does not show any control by the general employer; that, conceding the propriety of the award against the insurance carrier of the general employer, the special employer was also liable for compensation and it was error to discharge its insurance carrier.

Louis Maggiora had been employed by his brother, a cement contractor, since 1923. In July of 1935, the John A. Roebling's Sons Company, which had a construction contract in connection with the Golden Gate bridge, hired a truck and driver from Maggiora for $12 a day, Maggiora to furnish gasoline and oil. It was stipulated that the driver be paid $6 a day as that was the rate established by the bridge district. The applicant

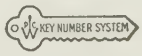
did hauling on the job at the direction of employees of Roebling's Sons and, on occasions, worked in their storeroom when he was not needed to drive his truck. Maggiora paid his salary and sent a substitute for him when he was ill for several days and admitted he had authority to discharge him if his work was not satisfactory and that he could have put his brother on another job by sending another driver to work for Roebling's Sons. Before the contract was concluded, the superintendent of Roebling's Sons asked Maggiora about his compensation insurance and asked to inspect the policy.

[1] The award against the petitioner is proper (National Auto. Ins. Co. v. Industrial Acc. Comm., 220 Cal. 642, 32 P.(2d) 356) and the discharge of the State Compensation Fund, carrier for the special employer, is improper. American Motorists Ins. Co. v. Industrial Accident Comm. (Cal.Sup.) 67 P.(2d) 103, this day filed.

[2-4] There is, however, a question as to whether the petitioner is entitled to object to the erroneous discharge of the insurance carrier for the special employer. While it is obvious that one employer cannot object if the injured employee does not proceed against a second employer who is jointly and severally liable with him, we think the rule should be different where both employers are brought before the commission and the award erroneously discharges one instead of making a joint and several award against both, since the relative rights of the employers may well be affected by a determination that only one of them is responsible for compensation to the employee. The right of contribution between joint obligors depends upon the satisfaction of more than a fair share of the claim against all. The erroneous discharge by award of the commission of an employer who has a joint and several obligation to pay compensation is a determination by a competent tribunal that the obligation is not joint, an issue which was properly before it for determination in a proceeding to which both were parties. Such a determination if not operative as res judicata in a subsequent suit between the employers, or their insurers, for contribution or reimbursement according to contract, would at least be competent evidence. See 1 Freeman on Judgments, p. 922; 15 Cal.Jur. 184. It is moreover a question within the exclusive jurisdiction of the Industrial Accident Commission and since that tribunal need not rigidly adhere to rules of pleading and practice, the petitioner should be allowed to make the objection.

That portion of the award which discharges the State Compensation Insurance Fund is annulled and the proceeding is remanded to the respondent commission with directions to enter its award in accordance with the views herein expressed.

We concur: CURTIS, J.; EDMONDS, J; LANGDON, J.; SHENK, J.; SEAWELL, J.



20 Cal.App.2d 377

KIBLER v. STONE et al.

Civ. 11268.

District Court of Appeal, Second District, Division 2, California.

April 15, 1937.

Hearing Denied by Supreme Court June 14, 1937.

1. Negligence ⇐136(9)

Contributory negligence is question of law only when a reasonable man can draw but one inference, and that inference points unerringly to negligence of plaintiff contributing to his injury.

2. Appeal and error ⇐1001(1)

Verdict of a jury, if there be any substantial evidence to support the findings of fact on which it is necessarily predicated, will not be disturbed on appeal.

3. Automobiles ⇐245(81)

Whether motorist who collided with automobile which had cut in ahead of her and stopped while she was traveling on boulevard at speed of from twenty-five to thirty miles per hour, the reason for the sudden stop being that traffic signal at intersection had changed from green to "caution," was contributorily negligent *held* for jury.

Appeal from Superior Court, Los Angeles County; H. Parker Wood, Judge.

Action by Alberta Kibler against Mrs. John Stone and others. Judgment for the plaintiff, and the defendants appeal.

Affirmed.

Nourse, Betts & Jones, of Los Angeles, for appellants.

Joseph L. Fainer, of Los Angeles, for respondent.

McCOMB, Justice.

Defendants appeal from a judgment in favor of plaintiff after trial before a jury. Viewing the evidence most favorable to plaintiff, the facts are:

December 31, 1935, defendant Philip Abron was driving an automobile owned by defendant Mrs. John Stone easterly on Santa Monica boulevard at a speed of 25 or 30 miles an hour. As he approached the intersection of Santa Monica boulevard and Rexford drive, he passed a car being driven by plaintiff, cut in front of it, and stopped. The reason for the sudden stop was because the traffic signal at the intersection changed from green to "caution." Plaintiff saw the car being operated by defendant Abron stop, and noted that the traffic signal had changed from green to "caution," at which time she was about 6 feet to the rear of his car. She applied her brakes but was unable to stop before hitting the rear of defendants' car, as a result of which plaintiff received personal injuries.

[1-3] This is the sole question presented for determination:

From the foregoing facts was the plaintiff as a matter of law guilty of negligence, which proximately contributed to the happening of the accident?

This question must be answered in the negative. The law is settled that contributory negligence is a question of law only when the court is impelled to say that from the facts reasonable men can draw but one inference and that an inference pointing unerringly to the negligence of the plaintiff contributing to his injury (Reaugh v. Cudahy Packing Co., 189 Cal. 335, 343, 208 P. 125). The verdict of a jury, if there be any substantial evidence to support the findings of fact upon which it is necessarily predicated, will not be disturbed on appeal (Morris v. Standard Oil Co., 188 Cal. 468, 471, 205 P. 1073). In the instant case plaintiff testified that, while she was driving in an easterly direction on Santa Monica boulevard at a speed of from 25 to 30 miles an hour, defendant Stone's car cut right in front of her and stopped. This evidence, when considered with the other evidence disclosed by the record, clearly left a question of fact from which reasonable men might draw different inferences. Therefore, under the rules above stated the jury's finding of facts is conclusive upon this court, and we cannot say that plaintiff was guilty of contributory negligence as a matter of law.

The judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

KEY NUMBER SYSTEM

20 Cal.App.2d 411

LAKE v. CHURCHILL.

Civ. 11224.

District Court of Appeal, Second District, Division 1, California.

April 19, 1937.

1. Automobiles ⇐244(32)

In action against motorist for death of pedestrian, evidence *held* to sustain finding that it was motorist's automobile which struck pedestrian, where motorist admitted running over something near scene of accident, told police officer that she thought she had hit a man, and there were marks on her automobile.

2. Evidence ⇐317(18)

In action against motorist for death of pedestrian whose body was found in street some distance from pedestrian lane, admission of testimony of pedestrian's wife, in attempt to show that he had been on pedestrian lane, that shortly before accident he told her that he was going to drugstore located on corner of block, *held* error.

3. Automobiles ⇐242(2)

In action against motorist for death of pedestrian, plaintiff had burden to establish negligence of motorist by showing some act or omission connected with operation of automobile that would not have taken place had automobile been operated by one exercising ordinary care, mere fact that accident had occurred not being sufficient.

4. Automobiles ⇐244(6)

In action against motorist for death of pedestrian whose body was found in street about 60 feet from pedestrian lane, finding of negligence of motorist *held* not sustained by evidence, where there was no showing as to how or in what manner pedestrian happened to be in street, or that he was

ever within pedestrian lane, or in what manner automobile collided with pedestrian.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by Lena Lake, and Lena Lake as administratrix of the estate of Orville S. Lake, deceased, against Ellen Churchill. From a judgment in favor of the plaintiff, the defendant appeals.

Reversed.

Francis W. Read, of Los Angeles, for appellant.

Bernard C. Brennan and Alfred E. Cate, both of Los Angeles, for respondent.

HOUSER, Presiding Justice.

From a judgment that was rendered against defendant in an action to recover damages for personal injuries which were alleged to have been caused by the automobile of defendant striking the husband of plaintiff, and which resulted in his death, defendant has appealed to this court.

From a consideration of the evidence that was produced on the trial of the action, as well as from the findings of fact that were made thereon, it appears that, in general, the facts were assumed to be as follows: At a time very shortly preceding the happening of the accident in question, which occurred at about 9:40 o'clock p. m., apparently it was concluded by the trial court that Mr. Lake had left his home, ostensibly for the purpose of visiting a drugstore that was situated at an intersection of two streets which was located about three or four blocks from where he resided. However, as far as is disclosed by the evidence, no one saw him in that vicinity until after the accident had occurred, when his lifeless body was found lying in the street at a point located about 60 feet, and at a right angle, from the nearest property or sidewalk line of the intersection. Within "about forty seconds" preceding that time, a boy fifteen years of age, who was employed in a drugstore which fronted on one of the intersecting streets, heard a "thump," and on investigation of the cause thereof, discovered the prostrate body of Mr. Lake, and immediately started in search of a police officer. At the time when the boy emerged from the drugstore, no automobile that was in motion was within his vision, but, when he returned to the scene after he had left it as aforesaid, which was within from three to seven minutes after he had discovered the body of Mr. Lake, defendant was approaching, or was in the very near vicinity of, the place where the body lay. She was in the street, either very close to the body, or walking near the sides of automobiles that were parked alongside the curb. Thereafter she made various statements from which it might have been inferred that she knew that her automobile had struck Mr. Lake. It had been parked at a distance of 165 feet from the sidewalk line of the intersection; and thereafter was impounded by the police officers. On close examination, certain marks and conditions appeared thereon, from which it also might have been inferred that it had suffered from a recent collision of some sort. Approximately 22 feet from the point where the body of Mr. Lake lay, and on the nearest line therefrom to a point in the nearest line of the pedestrian lane of the intersection, Mr. Lake's spectacles were found; likewise a "nickel" in very close proximity thereto.

Defendant's testimony was to the effect that at about 9:40 o'clock p. m. she arrived in her automobile, which was being operated by her, at the intersection of the two streets. The headlights of her automobile were "completely on." On reaching the intersection, she made the boulevard stop and observed that no one was within the crosswalk. She paused long enough to observe the crosswalk and all the corners of the intersection and to ascertain that no one was "within the crossing." She then started her automobile, and, prior to any impact, traveled at about 15 to 20 miles per hour. She observed the street ahead of her, keeping her eyes on the road. When she was "in front of the fruit stand," she heard what she described as a "crunching noise." There was no jar at the time she heard the noise. It sounded as though she had "sloughed a piece of wood under the car." She then brought her automobile to an easy stop, without skidding, about 100 feet from where she had heard the noise, and stopped in what she described as the second lane of traffic. On stopping the automobile and walking back, she saw a man lying in the street. Thereafter, she made a statement to a police officer that she thought she had "hit a man." A police officer testified that she told him that the brilliant lights "on the theater" made it hard for her to see, and that she did not know that she had hit any one until a passing motorist stopped her and told her that she had hit a man. He also testified that after he had taken defendant

to her home she called some one on the telephone and said that she had struck a man.

[1, 2] From a consideration of the foregoing, it is concluded that the finding of fact made by the trial court, in effect, that defendant's automobile struck Mr. Lake and caused the injuries from which he died, in regard to which appellant urges that prejudicial error was committed by the trial court, was warranted by the evidence; and, consequently, that appellant's objection in that regard cannot be sustained. However, with reference to certain other express findings of fact which were made by the trial court, this court is unable to discover in the evidence, either direct or indirect, testimony that would support them; for example, that, in substance, defendant's automobile struck Mr. Lake within the pedestrian lane of the intersection. Other than the erroneously admitted testimony that was given by Mrs. Lake, to the effect that when Mr. Lake let his home he said that he was going to return to a drugstore some merchandise that he had previously purchased thereat,—coupled with the conjecture that the drugstore which Mr. Lake had in mind was the one which was located on one of the corners of the intersection,—the evidence is entirely lacking as to how or in what manner Mr. Lake happened to be in the street at all, to say nothing of the possibility that he ever was within the pedestrian lane. Likewise, viewed from the standpoint of what evidence was before the trial court, just as impossible and equally devoid of substantial support was the determinative finding of fact "that at the time and place aforesaid, the said defendant, Ellen Churchill, so carelessly, negligently, recklessly, and unlawfully drove, operated, managed and controlled the said Buick automobile that the same was caused to run into the decedent Orville S. Lake with great force and violence, by reason whereof the decedent was thrown to the street, whereby and because whereof he sustained personal injuries from which he died." In that regard, the only important issue which the finding purported to settle was that of the asserted negligence of defendant in striking Mr. Lake with her automobile. But upon what specific act or acts of defendant the finding of negligence was predicated is not discoverable from a careful review of the evidence. The most that may be said to appear is that in some unexplained manner defendant's automobile collided with the person of Mr. Lake. It is true that a witness testified that the brakes on defendant's automobile were in a poor mechanical condition; but nothing appears from which it might have been inferred that that fact had any connection whatsoever with the cause of the accident. As hereinbefore has been narrated, one witness heard a "thump"; and defendant heard a "crunching noise"; but even assuming that such noises were caused by an impact of the automobile with the body of Mr. Lake establishes no evidence of negligence on the part of either of the participants in the accident. It is just as reasonable to conclude that Mr. Lake was negligent as it is to conclude that defendant was negligent. According to her testimony, which is all the direct evidence that is contained within the record regarding her conduct at the instant when she heard the "crunching noise," her automobile was well lighted and was traveling no faster than 15 to 20 miles per hour. Immediately before that time she had brought the automobile to a stop at the intersection; had ascertained that no pedestrian was within the pedestrian lane; and thereafter, after having crossed the intersecting street, had traveled a distance of probably less than 60 feet before she heard the "crunching noise." Defendant "watched the street; * * * all the part ahead of me; * * * the way that any motorist drives and looks ahead and keeps his eyes open."

[3, 4] The burden rested upon plaintiff to establish negligence on the part of defendant. The mere fact that the accident occurred is not sufficient. To the contrary, at least some act or omission connected with defendant's operation of the automobile must appear to have occurred that in the circumstances would not have taken place had the automobile been operated by a person who was exercising ordinary care in the premises. Since such a situation is not disclosed by the record herein, it follows that the finding of negligence of defendant cannot be sustained.

The judgment should be reversed. It is so ordered.

We concur: YORK, J.; DORAN, J.

20 Cal.App.2d 383

PACIFIC MORTG. GUARANTY CO. v. ROSOFF et al.

Civ. S. C. 16.

District Court of Appeal, Second District, Division 1, California.

April 16, 1937.

1. Fixtures ⇐20

Wall beds attached to wall of apartment building by means of brackets or plates screwed to building and linoleum cemented to floors and curtain rods screwed to walls with intention to affix such articles permanently *held* "fixtures" subject to lien of trust deed on apartment building as between holder of trust deed and conditional seller of fixtures, since removal of such articles would impair security of holder of trust deed (Civ.Code, § 660).

[Ed. Note.—For other definitions of "Fixture," see Words & Phrases.]

2. Fixtures ⇐20

Contractor who sold apartment owners wall beds, linoleum, and curtain rods called for by specifications on file with mortgagee according to which contractor agreed to construct building, and which provided that no fixtures or materials should be used which had been purchased under conditional sale contract, *held* not entitled to such articles as against mortgagee on ground that he had no knowledge of agreement between mortgagors and mortgagee (Civ.Code, § 660).

3. Judgment ⇐248

Judgment in favor of mortgagee, enjoining mortgagors and contractor from removing wall beds, linoleum, and curtain rods from apartment on ground that such articles were fixtures within coverage of mortgage, would be affirmed, where contractor failed to plead title to or right of possession of property, and court made no finding that he had sold the property under conditional sale contract, or had any interest therein, since judgment in favor of contractor would have been without support in pleadings, proof, or findings (Civ. Code, § 660).

Appeal from Superior Court, Los Angeles County; Parker Wood, Judge.

Action by the Pacific Mortgage Guaranty Company against Jacob Rosoff and another, and Isidor Carroll. Judgment for plaintiff, and defendant Isidor Carroll appeals.

Affirmed.

Jerome H. Kann, of Los Angeles, for appellant.

Shattuck, Davis & Story, of Los Angeles, for respondent.

SHINN, Justice pro tem.

Plaintiff prevailed in this action to enjoin defendants from removing certain wall beds, linoleum, and curtain rods from an apartment building; the finding of the court being that the articles were fixtures and subject to the lien of plaintiff's trust deed on the real property. Defendants Jacob and Mary Rosoff, owners of the property, consented to the injunction. Defendant Carroll, contractor for the building, resisted the injunction, claiming that he had furnished the wall beds, linoleum, and curtain rods to defendants Rosoff and installed them in the building under an agreement reserving title in himself until they were paid for. He claimed the right to remove them because of the purchasers' failure to pay, and he alone appeals from the judgment.

Defendants Rosoff borrowed from plaintiff upon their trust deed $90,000, for use in the construction of an addition to their building, and gave their note and trust deed for the amount. The original specifications did not call for the beds, linoleum, or curtain rods, but by amended specifications, agreed to by the Rosoffs and plaintiff, and on file with plaintiff before construction was commenced, and during the time it was under way, these additional articles were called for as a part of the construction. Defendant Carroll contracted with the Rosoffs to construct the building according to plans and specifications on file with plaintiff. The court found that the property in question was attached to the real property, was a part of the consideration for the making of the loan, and was required by plaintiff as a part of the security under the deed of trust. It was also found that the removal of the property would impair plaintiff's security and cause it to suffer great and irreparable injury.

[1] In support of his argument for reversal, appellant urges the following: That the articles were not fixtures; that he had no knowledge that the property in question was included in the specifications

for the construction of the building; that he furnished the same to defendants Rosoff under an oral conditional sales contract, of which plaintiff had sufficient notice to put it on inquiry as to the terms of the sale; and that as the Rosoffs did not pay him for the beds, etc., he therefore had the right to remove them.

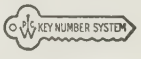
That the property was permanently attached to the building admits of no doubt. Although it was held in Southern Cal. H. & M. Co. v. Borton, 46 Cal.App. 524, at page 530, 189 P. 1022 (opinion of the Supreme Court in denying a hearing), that wall beds attached as the ones in question here were, by means of brackets or plates screwed to the building, retained the character of personal property, the case was one in which there was no evidence of an intention to attach them permanently to the building. Wall beds were held to be fixtures in the case of Broadway Improvement & Investment Co. v. Tumansky, 2 Cal.(2d) 465, 41 P.(2d) 553, where, as here, the owner had placed them in a building constructed with the proceeds of a building loan and with the intention that they should become a part of the building, and of the realty which stood as security for the loan. The linoleum in question was cemented to the floors and the curtain rods were screwed to the walls. These methods of attachment were sufficient to make the articles fixtures where there was a clear intention to affix them permanently and their removal would impair the security of the encumbrancer. Civ.Code, § 660; Dauch v. Ginsburg, 214 Cal. 540, 6 P.(2d) 952; Hammel R. Corp. v. Mortgage Guarantee Co., 129 Cal.App. 468, 18 P.(2d) 993.

[2] Appellant's contention that he had no knowledge of the agreement between the Rosoffs and the Mortgage Company is without merit. He was present when the loan was negotiated. He was the contractor who constructed the building. He agreed with the Rosoffs that he would construct it according to specifications on file with the Mortgage Company. The specifications, including the amendments, which called for the installation of the articles in question, were with the Mortgage Company available for his inspection. He was not misled by any act or statement of the Mortgage Company with reference thereto. If he did not know what had been specified, his ignorance was due to his negligence. If he had made inquiry he would have learned not only that the articles in question were specified as a permanent part of the building, but also that the specifications provided that no fixtures or materials were to be used which had been purchased under contract reserving title in the seller.

[3] The judgment must be affirmed upon the authority of the cases we have cited. An additional ground for affirmance, if one were needed, is that appellant did not plead any title to or right of possession of the property, and the court made no finding that he had sold the property under a conditional sales contract, or that he had any interest in it. Had the judgment in the court below been in favor of defendant Carroll it would have been without support in the pleadings, the proof or the findings.

The judgment is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.



20 Cal.App.2d 386

PEOPLE v. TRIPPELL.

Cr. 2969.

District Court of Appeal, Second District, Division 2, California.

April 16, 1937.

1. Criminal law ⇐981(2)

Court *held* not to have abused its discretion in denying motion of defendant, who had been convicted of an indecent assault against child, but whose punishment had not begun, to determine his sanity and to halt punishment until sanity was restored, where defendant had come before court numerous times, enabling it to exercise its powers of observation as to his sanity (Pen. Code, §§ 1367, 1368, 1587; § 288, as amended by St.1933, p. 1028).

2. Criminal law ⇐1144(17)

Presumption of validity obtained as respects order of court denying motion of defendant whose punishment had not begun, to determine his sanity and to halt punishment until sanity was restored.

3. Criminal law ⇐981(2)

Under statute providing that a person cannot be punished for a public offense while he is insane, defendant who had been convicted *held* not entitled to examination as to his sanity while incarcerated in county jail for safekeeping pending delivery to penitentiary or while being delivered to penitentiary, since there is no punishment until actual confinement (Pen.Code, §§ 670, 1367, 1368, 1587).

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Al Trippell was convicted of an indecent assault against a child, and from an order denying a motion after judgment to determine the sanity or insanity of the defendant and to halt punishment provided by judgment until his sanity was restored, the defendant appeals.

Affirmed.

Morris Lavine and Rex I. McCreery, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

CRAIL, Presiding Justice.

This is an appeal from an order denying a motion after judgment to determine the sanity or insanity of defendant and to halt the punishment provided by the judgment until his sanity was restored. The motion was brought under section 1367 of the Penal Code, which reads: "A person cannot be tried, adjudged to punishment, or *punished* for a public offense, while he is insane."

As long ago as the year 1934 the defendant, a former deputy district attorney, was accused by information of the crime of violation of section 288 of the Penal Code (as amended by St. 1933, p. 1028). He entered a plea of not guilty, but never a plea of not guilty by reason of insanity. He was found guilty, April 17, 1935. He appealed from the judgment of conviction to the District Court of Appeal, which court affirmed the judgment. People v. Trippell, 54 P.(2d) 763. Thereafter, he succeeded in having the judgment reviewed by the Supreme Court, which court again affirmed it. People v. Trippell, 61 P.(2d) 929. Upon return of the remittitur and before the sheriff took him with the order of commitment to the state penitentiary, he obtained a stay by the trial court while he prepared and presented a motion for probation. An additional stay was requested and granted. After the motion for probation was denied, and not before, the defendant made the instant motion. It was accompanied by the affidavit of a doctor in which he states: "In my opinion this man is in need of state hospital care as continued incarceration in jail is likely to aggravate his psychosis." Execution of the judgment was again stayed until, on February 9, 1937, the motion came on for hearing. It was argued and denied. It is from this order the appeal is taken. The defendant would long since have been in the state penitentiary had not a stay been granted by this court until the termination of this appeal. All of said stays were made upon application of the defendant.

The defendant relies upon that part of section 1367 which we have italicized above, which runs to the effect that a person cannot be *punished* for a public offense while he is insane. It is the defendant's contention that the order was made by the trial court on the ground that after the conviction of the defendant the court lacked jurisdiction to make such an order.

The Attorney General contends that this section must be read in connection with section 1368, which reads in part, "If at any time during the pendency of an action up to and including the time when defendant is brought up for judgment on conviction a doubt arises as to the sanity of the defendant, the court must order the question as to his sanity to be submitted to a jury; and the trial or the pronouncing of the judgment must be suspended until the question is determined by their verdict," and that said section definitely limits the trial court's jurisdiction to try the question of insanity to a time prior to the time when the defendant is brought up for judgment, and further that it must be read in connection with section 1587 of the Penal Code which reads: "When the warden, and such other officers as may be designated by the directors to act with him in such cases, shall be of opinion that any convict is insane, they shall make proper examination, and if they remain of the opinion that such person is insane, the warden shall certify the fact to the superintendent of one of the state asylums for the insane, and shall forthwith send such convict to said asylum for care and treatment." The Attorney General contends that the legislature has provided a well-rounded plan for the protection of insane persons or those who be-

come insane in a criminal proceeding. As against this position the defendant contends that there is a hiatus between the time of sentence and the time when the defendant reaches the prison gate which is unprovided for under the law; that therefore we must look to the common law for guidance during this period, and that by the common law, under the circumstances related above, the defendant is entitled as a matter of right to a trial by jury as to his sanity or insanity. In this behalf he quotes Blackstone, Book 4, §§ 24 and 25.

The question is a rare one, and we go to a decision of the Supreme Court of the United States, decided in 1897, for a statement of the common law under such a situation. In the case of Nobles v. State of Georgia, 168 U.S. 398, 18 S.Ct. 87, 91, 42 L.Ed. 515, the same question came before that court upon the contention of a defendant who had been convicted of murder that under somewhat similar circumstances he was entitled to a jury trial as a matter of right and that having been denied a trial by jury there was a failure of the trial court to observe "due process of law." After quoting at length the language of Blackstone relied upon by the defendant and after analyzing the same, the high court said: "In other words, by the common law, if, after conviction and sentence, a suggestion of insanity was made, not that the judge to whom it was made should, as a matter of right, proceed to summon a jury, and have another trial, but that he should take such action as, in his discretion, he deemed best. * * * The plea at this stage is only an appeal to the humanity of the court to postpone the punishment until a recovery takes place, or as a merciful dispensation. * * * 'If the right of trial by jury exist at all, it must exist at all times, no matter how often the plea is repeated alleging insanity occurring since the last verdict. * * * There must be a sound discretion to be exercised by the court. If a case of real doubt arise, a just judge will not fail to relieve his own conscience by submitting the fact to a jury.' * * * It being demonstrated by reason and authority that at common law a suggestion, made after verdict and sentence, of insanity, did not give rise to an absolute right on the part of a convict to have such issue tried before the court and to a jury, but addressed itself to the discretion of the judge, it follows that the manner in which such question should be determined was purely a mattter of legislative regulation. It was therefore a subject within the control of the state of Georgia." The court also demonstrated the obvious unsoundness of the defendant's contention by pointing to "the absurd conclusion" which would result from its establishment. It said: "If it were true that at common law a suggestion of insanity, after sentence, created on the part of a convict an absolute right to a trial of this issue by a judge and jury, then (as a finding that insanity did not exist at one time would not be the thing adjudged as to its nonexistence at another) it would be wholly at the will of a convict to suffer [or not to suffer] any punishment whatever, for the necessity of his doing so would depend solely upon his fecundity in making suggestion after suggestion of insanity, to be followed by trial upon trial."

[1, 2] It will be further observed that the order of the court was not a denial to the defendant of a trial by jury after *doubt* had arisen as to his sanity, but was merely a denial by the court that it had a doubt of the defendant's sanity. We are of the view that the court did not abuse its discretion in the matter. We have set forth above the numerous delays obtained by the defendant and the numerous times he came before the court. During these times the court may well have exercised its own powers of observation as to the defendant's sanity. All presumptions are in favor of the order. It is a fair presumption that the court denied the motion for the reason that no doubt as to the defendant's sanity had been created in its mind.

[3] Finally, it must be remembered that the defendant is not being punished while he is incarcerated in the county jail. The only purpose in retaining defendant in the county jail at this time is to guard against his escape and to insure his custody for delivery to punishment. In re Ahumada, 93 Cal.App. 152, 269 P. 181. Neither will the defendant be subject to punishment while he is being delivered to the state penitentiary. It is the fact of actual imprisonment which constitutes punishment. Ex parte Williams, 87 Cal. 78, 24 P. 602, 25 P. 248. "The term of imprisonment fixed by the judgment in a criminal action commences to run only upon the actual delivery of the defendant at the place of imprisonment." Pen. Code. § 670, Ex parte McGuire, 135 Cal. 339, 67 P. 327, 87 Am.St. Rep. 105. Until that time section 1367 of the Penal Code will not have been violated.

Immediately upon the delivery of the defendant within the prison gates authority vests in the warden and others under section 1587 to make proper examination to exercise the merciful dispensation of the People.

Order affirmed.

I concur: McCOMB, J.

WOOD, Justice (concurring).

I concur in the judgment. In Nobles v. State of Georgia, 168 U.S. 398, 18 S.Ct. 87, 42 L.Ed. 515, petitioner had been sentenced to death. The Georgia Code (Code 1882, § 4666) provided: "If, after any convict shall have been sentenced to the punishment of death, he shall become insane, the Sheriff of the county, with concurrence and assistance of the Ordinary thereof, shall summon a jury of twelve men to inquire into such insanity." In affirming the judgment the court said that the manner in which a suggestion of insanity should be determined was purely a matter of legislative regulation. The California Legislature has provided the manner in which questions of alleged insanity are to be determined. Before sentence section 1368 of the Penal Code is applicable. After sentence the question of the mental condition of defendant is in my opinion to be determined in the manner provided by section 1587 of the Penal Code.



20 Cal.App.2d 332

HOLM v. BRAMWELL.

Civ. 5786.

District Court of Appeal, Third District, California.

April 13, 1937.

1. Mechanics' liens ⇐5

Mechanics' liens are entirely statutory, and claimant must at least substantially observe and comply with provisions of statute, none of which may be regarded as unessential.

2. Mechanics' liens ⇐73(9)

Mechanic's lien may not be founded on contract procured contrary to law.

3. Licenses ⇐39

Under Contractors' License Law prohibiting, as misdemeanor, person acting as subcontractor without license, and barring suits by such persons, contractor's contract for materials and labor with unlicensed subcontractor who was partner of partnership which received license prior to time labor was performed by subcontractor was void, notwithstanding that statute did not expressly make such contracts void (Gen.Laws Supp.1933, Act 1660, §§ 1, 3, 12).

4. Contracts ⇐138(1), 140

Party to illegal contract may not rest his cause or recover judgment based on such void agreement, and test whether demand connected with illegal transaction is capable of being enforced is whether plaintiff requires aid of illegal transaction to establish his case.

5. Contracts ⇐140

Recovery may be authorized in spite of illegal contract when action is not founded thereon, but on subsequent legal contract which may be established without reference to illegal contract.

6. Mechanics' liens ⇐73(1)

In mechanic's lien suit, owner *held* not liable for advances by contractor to subcontractor for materials and labor, where subcontractor was unlicensed at time contract was made with contractor, notwithstanding that partnership, of which subcontractor was partner, obtained license before labor was performed, since it would be presumed that advances were voluntarily made, and contract was void (Gen.Laws Supp.1933, Act 1660, §§ 1, 3, 12).

7. Payment ⇐82(1)

One who voluntarily pays illegal demand, knowing it to be illegal, or in ignorance or misapprehension of law respecting its validity, and not under compulsion or coercion, is not entitled to relief.

Appeal from Superior Court, Los Angeles County; Wilber F. Downs, Judge.

Suit by John Holm against C. H. Bramwell. From a judgment in an amount less than that prayed for, plaintiff appeals.

Modification directed, and, as modified, affirmed.

Charles T. Rippy, of Torrance, and Dana R. Weller, of Los Angeles, for appellant.

C. Roy Smith and Stacy H. Aspey, both of Long Beach, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiff, a licensed building contractor, has appealed from a judgment of foreclosure of a mechanic's lien which was rendered in his favor to secure the payment of $2,441.92 and interest. The court disallowed his claim to the extent of $1,108.63, which amount he voluntarily paid to a subcontractor pursuant to an agreement which was held to be illegal for the reason that the subcontractor was not licensed as required by the Statutes of 1929. Stats. 1929, p. 1591, as amended, 1 Deering's Gen. Laws of California of 1931, p. 722, and Gen. Laws Supp.1933, p. 1278, Act 1660. The appellant contends this item should have been allowed.

C. H. Bramwell, a resident of Chicago, is the owner of five contiguous lots in Los Angeles. He made a contract with the plaintiff, Holm, to construct buildings on those lots, in compensation for which he agreed to pay plaintiff the cost thereof, plus 10 per cent. Holm was a duly licensed contractor. Holm employed George Collins, who was not a licensed subcontractor, to furnish certain materials and perform certain labor upon the buildings, for which Holm paid him the sum of $1,108.63, no part of which has been refunded. Collins bid for and received from Holm a contract for the brick work February 4, 1934. He was not then licensed. On February 23, 1934, before the labor was performed by Collins, a contractor's license was issued to "Mrs. George Collins & Company," which was found to be a copartnership of which George Collins was a member. The buildings were completed at a total cost of $8,962.62. The owner paid Holm $6,159.40 of that sum. A balance of $3,699.48 remained unpaid. The owner, contending that the cost of the buildings was excessive refused to pay Holm the balance on the theory that he had awarded certain contracts for materials and labor to an unlicensed subcontractor, which was contrary to law and invalid. The plaintiff then brought this suit to establish a mechanic's lien on the property and to sell it to satisfy the unpaid balance of $3,699.48. The court adopted findings favorable to the plaintiff in every respect, except that it was found that the claim, to the extent of $1,108.63, was founded on an illegal contract which Holm had made with an unlicensed subcontractor contrary to law, and that it was therefore void. Judgment was accordingly rendered for the plaintiff for the sum of $2,441.92, for the payment of which a lien was established. It is conceded that the court found and that the plaintiff is entitled to judgment for the additional sum represented by 7 per cent. interest on $2,441.92 from September 11, 1934, which item for interest was not included in the judgment. The court, however, disallowed the item of $1,108.63, as illegal, finding that the subcontract therefor was contrary to law and void. From that judgment, the plaintiff has appealed.

We are of the opinion the plaintiff's contract with the unlicensed subcontractor is illegal and void and that the court properly disallowed those items in the aggregate sum of $1,108.63 and properly refused to vest a lien upon the property for the payment of that sum.

[1] Mechanics' liens are creatures of statute and therefore dependent upon at least substantial compliance with the law. Numerous authorities support the text which is found in 17 California Jurisprudence, page 81, § 50, as follows:

"Mechanics' liens are entirely of statutory creation, and the statute must be looked to both for the right to the lien and the mode by which it can be enforced. The right to a mechanic's lien depends upon a compliance with the statute, and in order that a valid lien may arise and be enforced, the claimant must strictly, or at least substantially, observe and comply with the provisions of the statute, none of which may be regarded as unessential."

[2] This is not a suit by a materialman or laborer to recover a claim for services performed or materials furnished to the owner of property upon the basis of a quantum meruit. It is a suit to recover money paid pursuant to an illegal contract with a subcontractor which is void. A mechanic's lien may not be founded on an illegal contract procured contrary to law.

That portion of the Contractors' License Law which is applicable to this cause provides as follows:

"§ 1. * * * It shall be unlawful for any person * * * copartnership * * * or other organization * * * to engage in the business or act in the capacity of a contractor within this State

without having a license therefor as herein provided. * * *

"§ 3. * * * A contractor within the meaning of this act is a person * * * copartnership * * * or other organization * * * who in any capacity other than as the employee * * * undertakes or offers to undertake or purports to have the capacity to undertake or submits a bid, to construct * * * any building * * * or other structure, project, development, or improvement, or to do any part thereof * * * provided, that the term contractor, as used in this act, shall include subcontractor. * * *

"§ 12. * * * Any person who acts in the capacity of a contractor within the meaning of this act without a license as herein provided, and any person who conspired with another person to violate any of the provisions of this act, is guilty of a misdemeanor. * * *" Gen.Laws Supp.1933, Act 1660.

It will be observed the act requiring a license to be procured applies to a subcontractor as well as to a contractor. Section 3 of the act defines a contractor or a subcontractor as a person, copartnership, or corporation who "undertakes or offers to undertake or purports to have the capacity to undertake or submits a bid, to construct * * * any building." Since the act applies specifically to a subcontractor, it is illegal for one to contract with him or to consider a bid for the construction of any part of a building, unless he is licensed according to law.

[3] The contract between the plaintiff and his subcontractor, who was not licensed as required by law, was illegal and void. Stockton Plumbing & Supply Co. v. Wheeler, 68 Cal.App. 592, 601, 229 P. 1020; Southlands Co. v. City of San Diego, 211 Cal. 646, 658, 297 P. 521; Firpo v. Murphy, 72 Cal.App. 249, 236 P. 968; City of Los Angeles v. Watterson, 8 Cal.App.(2d) 331, 346, 48 P.(2d) 87; 2 Restatement of the Law of Contracts, p. 1087, § 580.

Assuming, without so deciding, that a contract with a duly-licensed copartnership would be valid, even though it were inadvertently made in the name of an individual member of that copartnership, the subcontract upon which the plaintiff relies was made with Collins before the partnership was licensed. The evidence is uncontradicted that the partnership of "Mrs. Geo. Collins and Company," of which George Collins was a member, was not licensed when the bid was accepted or until after the contract for the brick work was awarded to him. It may, therefore, not be said the plaintiff contracted for that work with a licensed subcontractor.

It is true the Contractors' License Law does not specifically provide that a contract in violation thereof shall be void. But section 12 does specifically provide that:

"Any person who acts in the capacity of a contractor [or subcontractor] within the meaning of this act without a license as herein provided, * * * is guilty of a misdemeanor," and shall be punished by a fine or imprisonment as described therein.

The same section further provides that:

"No person engaged in the business or acting in the capacity of a contractor [or subcontractor] as defined by section 3 of this act, shall bring or maintain any action in any court of this State for the collection of compensation for the performance of any act for which a license is required by this act without alleging and proving that such person was a duly licensed contractor at the time the alleged cause of action arose."

[4] It has been repeatedly held that a party to an illegal contract may not rest his cause or recover judgment based upon such void agreement. In Wise v. Radis, 74 Cal.App. 765, at page 775, 242 P. 90, 94, it is said thereof:

"No principle of law is better settled than that a party to an illegal contract or an illegal transaction cannot come into a court of law and ask it to carry out the illegal contract or to enforce rights arising out of the illegal transaction. He cannot set up a case in which he necessarily must disclose the illegal contract or the illegal transaction as the basis of his claim. In Moore v. Moore, 130 Cal. 110, 62 P. 294, 80 Am.St.Rep. 78, our Supreme Court quotes Judge Duncan in Swan v. Scott, 11 Serg. & R.(Pa.) [155] 164, as follows: 'The test whether a demand connected with an illegal transaction is capable of being enforced is whether the plaintiff requires the aid of the illegal transaction to establish his case. If the plaintiff cannot establish his case without showing that he has broken the law, the court will not assist him, whatever his claim in justice may be upon the defendant.'"

In the case of Firpo v. Murphy, 72 Cal. App. 249, 236 P. 968, 969, it is said, with respect to the illegality of a contract enacted under a statute which is intended to protect the public against imposition:

"While there is no express declaration in these sections that the transactions condemned are unlawful, or that no recovery shall be had thereon in the event that the provisions are violated, still it has been held that they, being designed for the protection of the public, and a penalty prescribed for a violation thereof, that such penalty is the equivalent of an express prohibition, and that a contract made contrary to the terms thereof is void, and further that whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case."

[5] There are certain cases in which a recovery may be authorized in spite of an illegal contract, when the action is not founded on the illegal contract, but when on the contrary it is based upon a subsequent legal contract or agreement which may be established without reference to the illegal contract.

In the present case, the plaintiff is clearly not entitled to recover a lien to secure the repayment of money which he advanced to George Collins pursuant to an illegal contract, for the reason that this suit is based upon that illegal contract and the claim cannot be established except by reference to the price fixed by the illegal contract. The present case, therefore, does not come within the exception to the general rule, above mentioned.

[6, 7] The contract between the plaintiff and the subcontractor, Collins, being illegal and void, the advances alleged to have been paid to Collins are not recoverable in this suit for the reason that they must be deemed to have been voluntarily made. Myers v. City of Calipatria, 140 Cal.App. 295, 299, 35 P.(2d) 377, 379; Metropolitan Casualty Ins. Co. v. Stone, 124 Cal.App. 430, 438, 12 P.(2d) 665. In the Myers Case, supra, it is said in that regard:

" 'It is the compulsion or coercion under which the party is supposed to act which gives him a right to relief. If he voluntarily pay an illegal demand, knowing it to be illegal, he is of course entitled to no consideration; and if he voluntarily pay such demand in ignorance or misapprehension of the law respecting its validity, he is in no better position, for it would be against the highest policy to permit transactions to be opened upon grounds of this character.' "

We find nothing in the authorities cited by the appellant in conflict with what we have heretofore said. The case of Hunt v. Douglas Lumber Co., 41 Ariz. 276, 17 P. (2d) 815, 820, upon which the appellant chiefly relies, may be readily distinguished from the present case. In the present case the general contractor seeks to recover money he paid to his own subcontractor under his agreement with the subcontractor who was not qualified to make a valid contract because he was unlicensed. It was the duty of the contractor to ascertain whether the subcontractor with whom he proposed to deal was licensed. The contractor was bound to know that the law requires all contractors and subcontractors to be licensed. The contractor was a party to the illegal subcontract under which he seeks to recover. This case does not present circumstances like the Hunt Case, in which a materialman, in good faith, furnished lumber to one whom he was led to believe was the agent of the owner of the building. In the Hunt Case the Douglas Lumber Company brought suit against Hunt, the owner of the building, and Estes, his contractor, to recover the reasonable value of lumber which it furnished at the request of the contractor, believing that he ordered the lumber as the agent of Hunt, and not as a mere contractor. That case was not based on the illegal contract. It was not a suit to recover the value of labor or materials furnished pursuant to the contract. It was not a suit by the contractor, nor was it decided on the theory that the lumber was furnished to the contractor. On the contrary, that case was decided on the theory that the lumber was sold to the owner of the building through Estes as his agent. The court says in that regard:

"We have then the following situation: Defendant [the owner] had authorized Estes [the contractor] to proceed with the improvements on his premises and plaintiff [Douglas Lumber Co.] had knowledge of that fact. It had no knowledge that, as a matter of law, the contract apparently existing between defendant and Estes, and which, if it did exist, made Estes the agent of defendant for the purpose of fixing a lien, was void. Under these circumstances the situation was that frequently existing where the relation of principal and agent

is involved. Where A by his conduct leads B to believe C is A's agent, the latter is estopped from denying the agency. * * * We think defendant herein is estopped so far as plaintiff is concerned from denying the existence of a valid contract, and therefore a statutory agency, between himself and Estes."

No such situation exists in the present case. No question of agency is here involved. The Hunt Case is not in point.

It is conceded the plaintiff is entitled to judgment according to the findings which were adopted for interest on the sum of $2,441.92 at the rate of 7 per cent. per annum from September 11, 1934.

The court is directed to ascertain the amount of interest due according to the findings and allow that sum as a part of the judgment. As so modified, the judgment is affirmed, respondent to recover costs on appeal.

We concur: PLUMMER, J.; PULLEN, P. J.



20 Cal.App.2d 490

FRATERS v. KEELING et al.

Civ. 5662.

District Court of Appeal, Third District, California.

April 22, 1937.

Hearing Denied by Supreme Court June 21, 1937.

1. Negligence ⇐108(1)

Plaintiff's allegations, that defendant owned and conducted wharf and float connected therewith for purpose of providing golf, hunting, fishing, boating, and bathing facilities to general public and that plaintiff for purpose of purchasing gasoline for outboard motor went upon float, established that plaintiff was not "invitee" but mere "licensee" and limited liability of defendant to refrain from wanton, willful, or intentional injury, regardless of whether plaintiff thought he could purchase gasoline, since invitation to public did not include invitation to come and purchase gasoline.

[Ed. Note.—For other definitions of "Invitee" and "Licensee," see Words & Phrases.]

2. Negligence ⇐32(1)

Limit of liability of owner of premises towards licensee is to refrain from wanton, willful, or intentional injury.

3. Negligence ⇐32(2)

Before person entering premises of another can be given standing of "invitee," it must appear that he entered premises at invitation of owner or occupant, and, if it is shown that his purpose was one of common interest or mutual benefit to owner or occupant and himself or was in connection with the former's business which was there carried on, an invitation is implied; but, if he was there for purposes purely of his own or of third party, which had no relation to business of owner or occupant, and in which owner or occupant had no interest, beneficial or otherwise, he is deemed a bare "licensee."

Appeal from Superior Court, Lake County; Benjamin C. Jones, Judge.

Action by Joseph L. Fraters against H. Vincent Keeling, as trustee in bankruptcy of the Clear Lake Beach Company, and others. From an adverse judgment, plaintiff appeals.

Affirmed.

Taft & Spurr, of Ukiah, for appellant.

Herbert V. Keeling, of Lakeport, Charles Kasch, of Ukiah, Lovett K. Fraser, of Lakeport, and Keith C. Eversole, of Ukiah, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff appeals from a judgment of dismissal following the action of the trial court in sustaining demurrers to plaintiff's third amended complaint. The plaintiff was given leave to further amend his complaint, but declining to do so, judgment of dismissal followed in due course. The action is one for personal injuries suffered by the plaintiff when going upon the premises belonging to, and under the control of the defendants.

The appellant contends that at the time of the injury he occupied the status of an invitee in relation to the defendants. The defendants contend that at the time of the injuries sustained the plaintiff occupied only the status of a bare licensee.

The third amended complaint contains the following allegations:

"3. That at all the times hereinafter mentioned the defendants owned, maintained and conducted for profit to themselves, certain property in Lake County, California, known and described as Lot 'K' of the Subdivision known as the Town of Lucerne, and in connection therewith owned, maintained and conducted a wharf extending southerly from said real property into the waters of Clear Lake, a distance of approximately three hundred feet, and having a float connected with said wharf on the easterly side of the southerly end thereof, for the purpose of providing golf, hunting, fishing, boating and bathing facilities, and the said defendants did by advertisement seek the patronage of the general public for such purposes on the aforesaid properties.

"4. That the aforesaid properties so owned, maintained and conducted by the said defendants, were, on the 20th day of April, 1935, and at the time of the injuries to the plaintiff hereinafter referred to in paragraph five hereof, in a defective and dangerous condition in the following particulars, to-wit: That said float had located within its exterior floor surface a hole in size sixteen inches by twenty-six inches, which at the time of the injuries to the plaintiff hereinafter referred to in paragraph five, was unknown to the plaintiff; that the easterly side of said float was water-logged and covered with water to a depth of about two inches, so that the said hole was obscured and was not marked by any signal or warning device whatsoever."

"6. That the plaintiff at about the hour of eleven o'clock A. M. on the 20th day of April, 1935, for the purpose of purchasing boating facilities, to-wit: gasoline for an outboard motor on a boat then and there being operated by him on the waters of Clear lake in response to the aforesaid invitation to the general public as alleged in paragraph three hereof, came upon said float to do business with, and at the invitation of said defendants, and at said time and place, by reason of the defective, dangerous and obscured visibility of said hole in the said float, without warning signals of any kind whatsoever, and the plaintiff relying upon the apparent safety and covered surface of said float, fell into said hole in said float, breaking four ribs and injuring his left eye so that he became totally blind in his left eye."

These paragraphs show that the plaintiff went upon the premises described for the purpose of purchasing gasoline. There is no allegation in the complaint that the plaintiff knew or even thought that the defendants were engaged in the business of selling gasoline. It would appear from the complaint that the plaintiff tied his boat to the float mentioned in the allegations so that he might obtain gasoline wherever the same could be purchased. The third paragraph which we have quoted shows that the invitation to the public did not include any invitation to the public to come and purchase gasoline. The invitation, as alleged, was confined to proving facilities for golfing, hunting, fishing, boating and bathing. The invitation is thus clearly shown not to include the sale of any articles of any kind whatsoever, and especially, not the conducting of a filling station for the purpose of supplying gasoline to intending purchasers. The furnishing of facilities for the purposes mentioned does not include the item of sales.

In 25 C.J. 334, "facilities" are thus defined: "Applied to carriers everything necessary for the convenience of passengers and the safety and prompt transportation of freight; everything incident to the general, prompt, safe, and impartial performance of the duties to the public at large imposed by the state, in the proper exercise of its police power, upon transportation or transmission companies. As applied to a ferry franchise, everything incident to the general, prompt, and safe carriage of passengers, boats in good repair, appliances answering the purpose and readiness and willingness to perform the services incident to the grant."

The law relating to licensees and invitees has been very fully considered in the following cases, to wit: Borgnis v. California-Oregon Power Co., 84 Cal.App. 465, 258 P. 394, and Aguilar v. Riverdale Cooperative Creamery Ass'n, 104 Cal.App. 263, 285 P. 889, 891. In both of the foregoing cases the facts set forth upon the trials thereof were held to establish the status only of a licensee. Here, the facts are shown by the pleadings. The plaintiff by his own allegations establishes the fact that he went upon the float mentioned in the complaint not for any purpose embraced within the alleged invitation extended by the defendants through their advertisements, or otherwise, but went upon the float for a distinct and different purpose. Whether the plaintiff thought or did not think that he could purchase gasoline from the defendants is immaterial, as he was going there upon what the complaint shows to be his own separate and distinct business.

The demurrers interposed by the defendants are both general and special. The special demurrer as well as the general would go to the point that the complaint fails to state a cause of action in that it does not allege that the defendants were engaged in the business which caused the plaintiff to tie his boat up at the float, and also that the complaint is uncertain in showing from whom the plaintiff intended or hoped to buy gasoline.

[1, 2] The complaint alleges the business of the defendants, and then clearly establishes, as we have said, that he tied up to the float mentioned in the complaint and entered upon the same upon a mission not connected with the alleged business of the respondents. This, of course, limits the liability of the defendants to refrain from any wanton, willful or intentional injury.

[3] Instead of entering into a discussion of what constitutes relation of licensee and invitee, we quote from the case of Aguilar v. Riverdale Cooperative Creamery Ass'n, supra, the following, which clearly differentiates the two relationships, to wit: "Whether a person entering the premises of another bears the legal status of an invitee or of a bare licensee depends upon the nature of the business which brings him on the premises, and before such person can be given the legal standing of an invitee it must appear that he entered the premises at the express or implied invitation of the owner or occupant thereof. If it be shown that his purpose in so entering was one of common interest or mutual benefit to the owner or occupant and himself, or was in connection with the former's business which was there being carried on, an invitation is implied. But if it be shown that he stood in no contractual relationship with the owner or occupant, and that he was there for purposes purely of his own or of a third party which had no relation whatever to the business of the owner or occupant, and in which the latter had no interest, beneficial or otherwise, he is deemed in law to be a bare licensee." This quotation is supported by a long list of authorities to which, for brevity's sake, we simply refer without copying the same herein.

In the Borgnis Case, supra, several pages of the opinion are given, illustrating the facts attendant upon the status of a licensee, and also of an invitee, to which we likewise refer without lengthening this opinion by quoting therefrom.

Having pleaded the facts establishing the plaintiff's status as a licensee, and not showing any acts on the part of the defendants which would charge any liability to the plaintiff while occupying such status, it follows that the trial court committed no error in sustaining the demurrers interposed to the plaintiff's complaint.

The judgment is affirmed.

We concur: THOMPSON, Acting P. J.; HELD, Justice pro tem.



20 Cal.App.2d 451

MEIER v. HAYES.

Civ. 10513.

District Court of Appeal, First District, Division 2, California.

April 21, 1937.

1. Pleading ⇐207

In action to foreclose a mortgage executed by executrix wherein complaint was silent regarding authority of executrix to borrow money or mortgage testator's estate and regarding application to probate court authorizing executrix to borrow money or to execute mortgage, general demurrer properly raised question as to sufficiency of complaint to state cause of action as against contention that question could only have been raised by special demurrer.

2. Appeal and error ⇐680(1)

Appellate court *held* not precluded from reviewing judgment overruling general demurrer because record did not show what point demurrer was intended to reach, nor what argument was made in trial court, since if for any reason demurrer should have been sustained, demurrant was entitled to present that reason to appellate court (Code Civ.Proc. § 434).

3. Stipulations ⇐3

Executrix *held* not precluded from appealing from judgment overruling her general demurrer to complaint in action to foreclose mortgage because of stipulation that executrix might set up identical defense in answer, where executrix was not bound to accept stipulation, since her contention presented question of law and not question of fact to be pleaded in her answer.

4. Executors and administrators ⇦151

Mortgage executed by executrix *held* invalid as to estate, where executrix had never applied for and was never granted permission to execute mortgage on behalf of estate (Probate Code, §§ 830–834).

5. Continuance ⇦7

Denial of continuance of action to foreclose mortgage *held* not abuse of discretion where at time of trial plaintiff's attorney contended that he had informed defendant's attorney that he might make application to trial court and that plaintiff's attorney would not oppose application, and motion for continuance was denied after hearing both parties.

Appeal from Superior Court, Ventura County; Pat R. Parker, Judge.

Action by Joseph T. Meier against Belle O. Hayes individually, and as executrix of the estate of John W. Brunton, deceased, wherein defendant as executrix filed a general demurrer. From a judgment for plaintiff, defendant as executrix appeals.

Judgment against defendant individually affirmed and judgment against defendant as executrix reversed.

Harry Rabwin and A. Feldman, both of Los Angeles (Marcus, Rabwin & Nash, of Los Angeles, of counsel), for appellant.

Y. B. Arsen, of Los Angeles, for respondent.

STURTEVANT, Justice.

This is an appeal from a judgment foreclosing a mortgage. The judgment was rendered against Belle O. Hayes as an individual, and also against her as executrix of the estate of John W. Brunton, deceased.

After being served with summons and complaint, Belle O. Hayes, as executrix of the estate of John W. Brunton, deceased, appeared and filed a general demurrer. At the same time, as an individual, she filed an answer. On being presented, the demurrer was overruled and the executrix stated that she would file an answer similar to the answer she had filed as an individual.

[1-4] The first point made by the defendant as executrix is that the trial court erred in overruling her demurrer. In making that contention, she calls to our attention that the complaint is wholly silent regarding anything contained in the will of John W. Brunton authorizing his executrix to borrow money or mortgage his estate, and regarding an application to the probate court authorizing the executrix either to borrow moneys or to execute a mortgage on the property of the estate for any purpose. The mortgage which was pleaded in haec verba is also entirely silent on those subjects. For these reasons, the defendant claims the complaint did not state a cause of action against her as executrix. The plaintiff concedes that his complaint might have been vulnerable if the defendant had filed a special demurrer, but not in the face of a general demurrer. That contention has been ruled against him. Fish v. McCarthy, 96 Cal. 484, 31 P. 529, 31 Am.St. Rep. 237. He also contends that the record does not show what point the demurrer was intended to reach nor what argument was made in the trial court. That point is without merit. If for any reason the demurrer should have been sustained, the demurrant was entitled to present that reason to this court. Code Civ.Proc. § 434; Hurley v. Ryan, 119 Cal. 71, 72, 51 P. 20. Again, the plaintiff says he stipulated in the trial court that Belle O. Hayes as executrix might set up the identical defense in her answer, and he argues that therefore the executrix was not injured. It is a sufficient reply to state that the executrix was not bound to accept the stipulation. Her contention presented a question of law, not a question of fact to be pleaded in her answer. In "The American Law of Administration," (3d Ed.) vol. 2, page 1148, Mr. Woerner says: "It may be stated, as a general proposition, that neither executors, unless specially thereto authorized by will, nor administrators have the power to bind the estate of the deceased by borrowing money." He cites Duryea v. Mackey, 151 N.Y. 204, 207, 45 N.E. 458. It is directly in point. In 24 C.J. 544, the rule is stated broadly that at common law the real estate of a decedent was not subject to his debts. In 11 Ruling Case Law 165 it is said: "An executor or administrator has no power to bind the estate of which he is the representative by his individual contracts nor can he impose any liability on the assets of the estate through such contracts." In 11b California Jurisprudence 174, "Executors and Administra-

tors," section 779, the author stated: "Without power given by law or by will the representative has no authority to charge or encumber real property of the estate." In the Probate Code, §§ 830–834, it is provided how and under what circumstances authority may be had to mortgage the estate of a decedent. The plaintiff made no attempt whatever to plead facts showing that the executors had ever applied for, or had ever been granted, permission to execute the mortgage in suit. It follows that as to the estate the mortgage was invalid. Howard v. Bryan, 133 Cal. 257, 265, 65 P. 462; In re Estate of Pforr, 144 Cal. 121, 126, 77 P. 825. We think it is clear, therefore, that the trial court erred in overruling the demurrer of Belle O. Hayes as the executrix of the estate of John W. Brunton, deceased.

On the trial of the action no evidence was introduced curing or tending to cure the defect above mentioned. The executrix contends that the trial court erred in entering judgment against her as executrix. For the reasons hereinabove stated, we think the contention must be sustained. The plaintiff seems to contend that the estate of Brunton is estopped, but the record does not show facts which would create an estoppel against the estate. Duryea v. Mackey, supra. He further contends that this is a case in which the trial court had the power to create an equitable lien. We think not. There are no facts stated in the record which would have justified the trial court in granting such relief. Howard v. Bryan, 133 Cal. 257, 263, 264, 65 P. 462.

[5] The defendant also complains because the trial court denied her motion for a continuance. The facts do not clearly appear from the record. However, as we understand the facts, they were as follows: The action had been regularly set down for trial. A short time prior to the date of trial Mr. Rabwin, one of the attorneys for the defendant, held a conversation with Mr. Arsen, the attorney for the plaintiff. In that conversation Mr. Rabwin stated to Mr. Arsen that Mrs. Hayes was sick and would not be able to attend the trial. Continuing, he asked Mr. Arsen if, when the case was called, the testimony of witnesses in attendance could be taken and then a continuance had for the purpose of producing Mrs. Hayes as a witness after her recovery, or that her testimony might be taken in the form of a deposition. It was the contention of Mr. Rabwin that Mr. Arsen gave his general consent. However, at the time of the trial the latter contended that he had said Mr. Rabwin might make his application to the trial court and that Mr. Arsen would not oppose the application. At the time of the trial Mr. Rabwin did make the application and, furthermore, he produced a letter from Dr. Hutchins, the physician in attendance on Mrs. Hayes. That letter is not contained in the record. After hearing from the respective parties, the trial court denied the motion for a continuance. Giving full effect to each of the foregoing facts, it may not be said that the trial court abused its discretion in refusing to grant a continuance.

Finally, the defendant complains because the trial court refused to grant a new trial. That point we think is not presented by the record. The transcript shows that on June 26, 1936, the defendant filed a notice of intention to move for a new trial, but the record does not show that she made a motion for a new trial, nor does it show any ruling thereon.

The judgment against Belle O. Hayes is affirmed. The judgment against Belle O. Hayes as the executrix of the estate of John W. Brunton, deceased, is reversed.

We concur: NOURSE, P. J.; SPENCE, J.

VARNER et al. v. SKOV.

Civ. 1652.

District Court of Appeal, Fourth District, California.

April 6, 1937.

Hearing Denied by Supreme Court

May 27, 1937.

1. Automobiles ⇐245(6)

Negligence of motorist who failed to sound his horn, was on wrong side of highway, and struck pedestrian when she was three-fourths of distance across highway, *held* for jury.

2. Negligence ⇐136(9)

Negligence is a question for jury where reasonable minds might differ as to whether defendant exercised the degree of care which was to be expected of a reasonably prudent man, under the circumstances then existing.

3. Automobiles ⇐160(4)

Statutory right of way granted automobile over pedestrian crossing roadway at other than a crosswalk *held* not absolute, but dependent on surrounding circumstances (St.1931, p. 2127, § 131½(c).

4. Automobiles ⇐245(72)

Contributory negligence of pedestrian who looked in direction of approaching automobile before starting across country highway, where she was struck, *held* for jury.

5. Automobiles ⇐246(39)

Where pedestrian paused and looked before crossing highway and driver alleged that he was misled into thinking she was going to wait for him to pass before she crossed, failure to instruct on doctrine of sudden emergency *held* error, where evidence justified inference that driver was not negligent up to the time that pedestrian dashed across road.

6. Appeal and error ⇐1067

Where motorist was misled by conduct of pedestrians as to her intention to cross highway, failure to instruct on doctrine of sudden emergency *held* reversible error in view of close questions of fact presented, and possible inference that motorist was not negligent up to time that pedestrian dashed across highway.

7. Appeal and error ⇐1067

In action for death of pedestrian struck by automobile, failure to instruct that if pedestrian was not exercising ordinary care she was not entitled to assume that driver would obey the law or use ordinary care *held* prejudicial in view of given instruction that pedestrians have right to assume that drivers will obey the laws and will use due care.

8. Automobiles ⇐246(60)

In action for death of pedestrian struck by automobile, instruction that, until overcome by contrary evidence, law presumed pedestrian did everything a reasonable, prudent person would do under the circumstances for her safety *held* error, where evidence introduced by plaintiff showed acts and conduct of injured party prior to and at time of accident.

Appeal from Superior Court, Riverside County; Roy D. McPherrin, Judge.

Action for damages by J. B. Varner, Mable Olsen, and Gladis Alexander against Oswald Skov. From a judgment for plaintiff, the defendant appeals.

Reversed.

Joseph A. Spray, of Los Angeles, and Loyal C. Kelley, of Riverside, for appellant.

Walter C. Davison, of Riverside, and Harvey W. Platt, of Hemet, for respondents.

BARNARD, Presiding Justice.

In this action for damages for the death of Mrs. Eva H. Varner a verdict was returned in favor of the plaintiffs, and the defendant has appealed from the judgment.

About 11 o'clock on the morning of February 25, 1934, Mrs. Varner was struck and killed by an automobile driven by the appellant. The accident occurred about a mile west of San Jacinto on Central avenue, which runs east and west with a sixteen-foot pavement in the center and with graveled shoulders. Mrs. Varner was struck as she was crossing from her home on the north side of this highway to an automobile which was parked on the south side of the road, opposite a private lane which led to her home. This car was driven by a Mrs. Record and was parked facing east, with its left wheels about a foot north from the southerly edge of the pavement. The nearest crossroad to the east of this private driveway was three-fourths of a mile away and the nearest one on the west was one-

quarter of a mile away. The appellant was driving west on Central avenue and his automobile struck Mrs. Varner at a point four feet north of the southerly edge of the pavement and slightly to the rear of the parked car. The day was clear, the highway was dry, and there was no other traffic near the scene of the accident.

An occupant of the Record car testified that he saw Mrs. Varner leave her house and proceed along the private driveway toward Central avenue at a fast walk; that she hesitated at a point about a foot north of the pavement and looked to the east; that she then proceeded to cross the pavement at a very fast walk or trot with her head down; that he could not see her during a portion of the time she was crossing the pavement because of the body of the car in which he was sitting; that he had observed the appellant's car when it was about a mile away; that it was then traveling about 40 or 45 miles an hour and its speed remained the same until the impact; that that car was about 140 feet from the point of collision when Mrs. Varner hesitated before crossing the pavement; that the appellant did not sound his horn; that a very short space of time elapsed between the time Mrs. Varner came to the edge of the pavement and the time the collision occurred; that the appellant's car crossed the center line of the highway about 90 feet from the point of collision and that it was on the south half of the highway at the time of the impact; that this car passed within 2½ feet of the Record car; and that Mrs. Varner was struck by the extreme left front bumper of the appellant's car. An officer testified that there was a dark tire mark about four feet from the southerly edge of the pavement, and opposite the west side of the private drive, which mark swerved toward the center of the highway. Mrs. Record testified that she parked her car opposite the Varner drive; that she saw Mrs. Varner leave the house and start walking down the driveway; that she slid over and opened the right door of the car; that when she got back behind the wheel she saw Mrs. Varner running across the road with her head "kind of ducked down; not seriously, but then just kind of ducked the way women run usually"; that she then saw the appellant's car about two or three car lengths from her car; that that car was then about the center of the highway and coming at an angle toward her car; and that the appellant's car "passed so closely that I think we could have touched hands if we had reached out."

The appellant testified that the road was dry with hard shoulders on each side of the pavement; that he first saw Mrs. Varner when she was about 25 feet north of the pavement; that she was then approximately 160 feet away from him and walking fast toward the pavement; that she paused at a point near the pavement and looked in his direction; and that she then lowered her head and dashed across the road. He further testified that when he was 300 feet from the point of collision he was traveling at 40 to 45 miles an hour; that he was still going at this speed when he was 200 feet from the point of collision; that he was traveling at 35 miles per hour when he was 100 feet away; that he took his foot off the accelerator when he was 60 to 65 feet from the point of collision; that when she paused near the pavement he believed she was going to let him pass and then she dashed across the road; that "she gave every indication that she was going to stop, and, therefore, after I had slowed up and seen this indication, I again began to step on the accelerator"; that "I thought she was doing what every pedestrian would do under the circumstances, and that was to wait; but I had no more than received that inclination that she was there to wait than she began to proceed. Then it was she made the dodge across the road"; and that he did not apply his emergency brake, but applied his foot brake about 20 feet before the collision. He testified that she paused and looked directly at him, and gave him the impression that she was going to stop. When asked if he speeded up after receiving that impression he replied: "Well, it was my intention to go ahead—whether I had begun to speed up, I don't know; but that is why the impact was as it was, because I was no more in the mood of stopping."

The appellant contends that the trial court erred in refusing to hold, as a matter of law, that he was not guilty of any negligence. It is argued that the deceased was standing in a place of safety and there was nothing in her actions to cause the appellant to believe that she intended to do anything else than remain there until he had passed; that when he was about 120 feet from her he reduced his speed a little and pulled his car to the left, straddling the center of the highway; that it was the natural and prudent thing to turn his car to the left and over the

center line of the highway in order not to pass too close to the pedestrian; that the speed limit was 45 miles an hour and the appellant's speed was about 40 miles an hour; that he had a right to travel at this speed until a situation arose which would cause a reasonably prudent man to believe that a condition of peril existed; and that no such a situation arose until the deceased left her position of safety and suddenly darted across the highway in front of his car, too late for him to stop.

[1, 2] While the evidence would have supported a judgment in favor of the appellant, it cannot be said therefrom, as a matter of law, that the appellant was free from negligence. He failed to sound his horn, he was traveling on the wrong side of the street, and he struck the deceased when she had crossed three-fourths of the pavement. An appraisal of the conduct of the two persons in question involves many facts and reasonable minds might well differ as to whether the appellant exercised that degree of care which was to be expected of a reasonably prudent man, under the circumstances then existing.

[3] It is next urged that the court erred in refusing to hold that the deceased was, as a matter of law, guilty of contributory negligence which proximately contributed to her injury. It is argued that the deceased was negligent in leaving a position of safety and running directly into the path of appellant's approaching automobile and in failing to yield to the appellant the right of way in violation of section 131½ (c) of the California Vehicle Act (St.1923, p. 517, as added by St.1931, p. 2127), as then in force, and that it must be held that such negligence was a proximate cause of the accident. The section of the California Vehicle Act referred to did not give to the appellant an absolute right of way without regard to surrounding circumstances and the question whether the deceased violated that section depends upon a number of facts. While the appellant admits that it would be absurd and ridiculous to claim that he would have had the right of way if he had been a mile away at the time the deceased started to cross this highway, he contends that it certainly appears that he had such a right of way under the circumstances here appearing. Interesting questions are suggested as to the precise point at which the first of these statements would cease to be ridiculous and the point at which the second would become a certainty. In White v. Davis, 103 Cal.App. 531, 284 P. 1086, 1091, this court said: "There seems to be a general rule running through the cases where a pedestrian, or one standing on a highway, is injured by an automobile, which usually determines whether the question of contributory negligence is one of law, or of fact. Where the injured party fails to look at all, or looks straight ahead without glancing to either side, or is in a position where he cannot see, or, in other words, where he takes no precaution at all for his own safety, it is usually a question for the court. Where he looks but does not see an approaching automobile, or, seeing one, erroneously misjudges its speed or distance, or for some other reason assumes he could avoid injury to himself, the question is usually one for the jury."

[4] This was a country highway, there were no marked or unmarked pedestrian lanes or crosswalks in the mile between the intersecting roads, and the deceased had a right, under proper circumstances, to cross this road. It appears, without conflict, that shortly before she reached the pavement she hesitated or stopped and looked in the direction of the approaching car. Whether a reasonably prudent person would have attempted to cross at that time depends upon a number of things, including how far away the appellant's car then was and the speed at which it was traveling. A pedestrian may have no certain knowledge of either of these things and must use his judgment. In the instant case the deceased took some precaution for her own safety, and we think that, under the evidence, it is peculiarly a question of fact, and not one of law, whether or not the precaution taken was that which a reasonably prudent person would have taken under the circumstances.

The appellant complains of the giving of several instructions and of the refusal to give certain others. Several of the points thus raised are based upon the contention that under section 131½ (c) of the California Vehicle Act the deceased was under the positive duty of yielding the right of way to the appellant and that that section necessarily prevents a recovery in this action. This contention is without merit and only a few of the points raised in connection with the instructions need be here considered.

[5, 6] The court refused to give an instruction on the doctrine of sudden emergency or peril which explained the doctrine

and instructed the jurors that if they believed from the evidence that the appellant, through no fault of his own, suddenly found himself in a position of peril and that he then exercised that degree of care in endeavoring to avoid the accident which an ordinarily prudent person would have exercised, under the same circumstances, he should not be found guilty of negligence even though they might believe it would have been better for him to have pursued a different course in endeavoring to avoid the accident. There is no contention that this instruction, which is rather long, was not correct in itself, and the only question presented is whether such an instruction should have been given under the circumstances shown by the evidence. It was appellant's theory that without fault upon his part he was suddenly confronted with a perilous situation when the deceased, after apparently stopping to allow him to pass, suddenly rushed across the highway; that being misled by her stopping and looking, he proceeded; that through an abundance of caution he pulled over to the center of the highway to avoid passing too close to her, and that when she suddenly darted forward he did the best he could to meet the sudden emergency. While the evidence justifies an inference of negligence on the part of the appellant, it would also justify an inference that he was not negligent up to the time the deceased, after stopping and looking, suddenly dashed across the road. There is evidence to support the appellant's contention that he was then faced with an emergency requiring quick action. It would appear to be entirely possible that the jury found him guilty of negligence on the theory that he did not adopt the best available course when the deceased started across the pavement. No other instruction on this subject was given, and, in our opinion, the evidence justified and demanded an instruction appropriate to the theory thus relied upon by the appellant. The appellant was entitled to have this matter presented to the jury and in view of the close questions of fact presented it could hardly be held that a failure to instruct the jury in this regard was not prejudicial.

[7] Complaint is made of the failure of the court to give instruction No. 4, as follows: "If you find from the evidence in this case that Mrs. Varner was not exercising ordinary care for her own safety and preservation while crossing the highway in question, then I instruct you that she was not entitled to assume that automobile drivers would obey the law or would exercise due care in or about the operation of motor vehicles. Only one who is himself not negligent is entitled to assume that others will exercise ordinary care. And, if the pedestrian is not guilty of negligence such pedestrian is entitled to assume that others will obey the law. Therefore, if you find from the evidence in this case that Mrs. Varner was not exercising ordinary care and ordinary vigilance for her own safety and protection, then I instruct you that she was not entitled to assume that the defendant would obey the law or would use ordinary care."

The respondents argue that this instruction merely states in negative form what is affirmatively stated in instruction No. 3, which was given by the court, reading as follows: "I instruct you that a person lawfully crossing a public street has the right to assume that all other persons using the street will also use ordinary care and caution. This rule allows pedestrians to assume, until the contrary reasonably appears, that the drivers of motor vehicles will obey and abide by the traffic laws and regulations, and will use due care and vigilance to avoid inflicting injury to them."

Instruction No. 3, which was given, does not clearly set forth that only pedestrians who are themselves not negligent are entitled to assume that others will obey the traffic laws and exercise ordinary care. If instruction No. 3 was given, instruction No. 4 should also have been given. While the error in this contention, standing alone, might not be sufficient to justify a reversal in view of all of the instructions given, it furnishes added weight to the contention that the absence of full and correct instructions may have influenced the verdict which was reached.

[8] A similar situation exists in connection with instruction No. 13, which was given, and which reads as follows: "You are instructed that in the absence of evidence to the contrary, the law presumes that Eva H. Varner used due care on her part, and that she did everything that a reasonable, prudent person would have done under the same circumstances for the protection of her own safety. This presumption continues throughout the case until and unless it is overcome by satisfactory evidence."

It has frequently been held that such an instruction should not be given where the evidence introduced by the plaintiff dis-

closes the acts and conduct of the injured party immediately prior to and at the time in question. That is the situation here. The evidence on behalf of the respondents rather completely sets forth the acts and conduct of the deceased, in so far as the same are material in this action. It has also been held in a number of cases in this state that under the circumstances thereof the giving of such an instruction, even if erroneous, was not sufficiently prejudicial to justify a reversal. While we think this instruction should not have been given here, it is unnecessary to decide whether or not it was sufficiently prejudicial to justify a reversal in view of the error above referred to.

Because of the close questions of fact presented, we think the errors in giving and refusing these instructions are sufficient to entitle the appellant to a new trial.

The judgment is reversed.

We concur: MARKS, J.; JENNINGS, J.



20 Cal.App.2d 328

GRAHAM v. JUSTICE'S COURT OF COLUSA JUDICIAL TP. et al.

Civ. 5811.

District Court of Appeal, Third District, California.

April 13, 1937.

1. Food ⇐15

Statutes relating to production and sale of honey, in their use of words "mark" and "label," do not manifest intent to make any particular distinction between them (St. 1935, pp. 1592, 1595, 1597, §§ 842, 843.2, 844).

A "mark" is an affixed or impressed, distinguishing sign or token; a label; a brand; a seal. A "label" is a mark or tag; an identification by inscription of the contents, ownership, etc.

[Ed. Note.—For other definitions of "Label" and "Mark," see Words & Phrases.]

2. Indictment and Information ⇐71

Complaint charging a misdemeanor is sufficient if the essential elements of the crime are set forth with common certainty.

3. Food ⇐20(1)

Complaint charging crime of selling "unlabeled" honey in violation of statutory provision requiring containers of honey to be conspicuously marked with name and address of distributor, net weight, and grade designation *held* to sufficiently identify the offense charged (St.1935, pp. 1595, 1597, §§ 842, 843.2, 844).

4. Constitutional law ⇐70(3)

Constitutionality of law relating to production and sale of honey which can be justified as an exercise of the police power in interests of public health will not be considered by court even though it might doubt wisdom and propriety thereof as a means of accomplishing the objectives justifying the regulation (St.1935, pp. 1595, 1597, §§ 842, 843.2, 844).

5. Food ⇐1

Statutes requiring markings on honey containers to show name of producer, weight, and grade designation *held* valid, and not unreasonable or to transcend powers of Legislature (St.1935, pp. 1595, 1597, §§ 842, 843.2, 844).

Petition for a writ by C. I. Graham against the Justice's Court of Colusa Judicial Township, Colusa County, state of California, and Ben R. Ragain, the justice thereof.

Writ discharged.

W. A. Latta, of Sacramento, for petitioner.

Ralph W. Rutledge, Dist. Atty., of Colusa, and David B. Denhardt, Deputy Dist. Atty., of Colusa, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

By this writ petitioner seeks to prevent respondent court and the justice thereof from bringing petitioner to trial upon a complaint which, it is alleged, fails to state any offense known to the law.

Two questions are here presented: First, the sufficiency of the complaint under which petitioner is charged, and, secondly, the constitutionality of the Honey Standardization Law, St.1935, c. 521, p. 1592; Agricultural Code, St.1933, c. 25, p. 60.

The complaint upon which the warrant of arrest was issued charges "that on or about the 20th. day of November, 1936, at and in the Colusa judicial township * * * the

crime of selling unlabeled honey in violation of section 844 of the Agricultural Code, as added by St.1935, p. 1597, a misdemeanor, was committed by C. I. Graham, as follows, to-wit: The said C. I. Graham at the time and place aforesaid did wilfully and unlawfully sell and deliver * * * an unlabeled can of honey."

It is the use of the word "unlabeled" in the complaint instead of the word "unmarked" as used in the statute that first draws the fire of petitioner. The only provision in section 844 of the Code referring to labels reads as follows: "Any containers or subcontainers of honey imported from any Territory or foreign country shall be labeled with the name of the Territory or country of origin." This provision also provides that any blended honey not produced in continental United States as well as honey which is a blend of two or more types of honey shall be so labeled, and that no containers or subcontainers of honey shall be marked or labeled with the name "California" unless produced entirely within this state. It is apparent, however, petitioner was charged with a violation of that part of section 844 of the Agricultural Code, which provides in part, "All containers or subcontainers of honey shall be conspicuously marked with the name and address of the producer or distributor; the net weight * * * and the grade designation." Section 842 makes it unlawful to sell any honey in bulk or in any container or subcontainer which does not conform to the provisions of the Code.

Section 843.2 of the Code provides, "When any markings are used or required to be used by this chapter, on any container of honey to identify the container or describe the contents thereof, such markings must be plainly and conspicuously marked, stamped, stenciled, printed, labeled or branded * * * on the top, front, or side of any container."

It is the contention of petitioner herein that the Code distinguishes between the act of labeling and otherwise marking, stamping, stenciling, or branding the container, and therefore objects to the complaint in that he is charged with having sold "an unlabeled can of honey" instead of "an unmarked can of honey."

[1] We do not believe that the Legislature was attempting to make any particular distinction between a mark or other identifying brand. In the common use of language the words "mark" and "label" are interchangeable. Webster defines "mark" as an affixed or impressed, distinguishing sign or token; a label; a brand; a seal. "Label" is a mark or tag; and identification by inscription of the contents, ownership, etc.

[2] The duty of the court here is to determine whether or not the complaint sufficiently identifies the offense charged. A complaint charging a misdemeanor need not describe the offense with the same degree of technical precision that is required in the case of indictment and information. It is sufficient that the essential elements of the crime are set forth with common certainty or "if the facts alleged squint at a substantive statement of the offense. * * * Ex parte Whitaker, 43 Ala. 323," Ex parte Williams, 121 Cal. 330, 331, 53 P. 706, and quoted in Re Kaster, 52 Cal.App. 454, 198 P. 1029; In re Avdalas, 10 Cal.App. 507, 102 P. 674.

[3] We believe, in view of the foregoing authorities, the complaint charged an offense known to the law.

Petitioner also attacks the constitutionality of the Honey Standardization Law.

[4] A considerable portion of the brief of petitioner is devoted to an attack upon the law, but the arguments there advanced are properly addressed to the legislative branch and are not such points as can be considered by us in determining the legality of the act. This act was passed under the police power of the Legislature, and was for the purpose of promoting the public health and incidentally to aid the honey industry by establishing known standards of kind and quality. In order to prevent deception in the sale and distribution of honey, it is provided, among other things, in the Code, that all containers must be conspicuously marked with specific information.

As has been often said, the courts may differ with the Legislature as to the wisdom and propriety of a particular enactment as a means to accomplishing a particular end, but as long as there are considerations of public health, safety, morals, or general welfare of the public which could have justified the regulation, the courts must assume that the legislative body had those considerations in mind and that those considerations justified the regulation. Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479.

[5] Petitioner also contends that the Code provisions are so unreasonable as to

transcend the powers of the law-making power, but in Re Bear, 216 Cal. 536, 15 P.(2d) 489, 490, 83 A.L.R. 1402, the court quoted the following with approval from Parrott & Co. v. Benson, 114 Wash. 117, 194 P. 986: "We cannot hold anything to be unjust discrimination or unreasonable restriction which requires merchandise to be sold for just what it is, and prevents its sale as something other than it is."

We believe, therefore, that the complaint under which petitioner herein is charged is sufficient, in that it charges defendant therein with an offense within the jurisdiction of respondent court and sufficiently identifies the offense charged, and that the act itself is a constitutional exercise of the power of the Legislature.

The writ is discharged.

We concur: THOMPSON, J.; PLUMMER, J.



20 Cal.App.2d 257

FEDERAL LIFE INS. CO. v. CARY.

Civ. 10312.

District Court of Appeal, First District, Division 2, California.

April 7, 1937.

Rehearing Denied May 7, 1937.

Hearing Denied by Supreme Court May 27, 1937.

1. Limitation of actions ⇐177(3)

Where party seeks relief from fraud committed more than three years before his action is commenced, complaint must allege times and circumstances under which facts constituting fraud were brought to his knowledge, so that court may determine whether discovery of such facts was within time alleged (Code Civ.Proc. § 338, subd. 4, as amended by St.1935, p. 1673).

2. Limitation of actions ⇐100(13)

Action commenced in 1936 to rescind health policies issued in 1925 on ground that fraud was discovered in 1935 through investigation of records of Veterans' Bureau held barred by limitation, where complaint alleged facts which showed affirmatively that insurer had means of knowledge and that it had knowledge of facts which would reasonably have put it upon inquiry which if pursued would have led to discovery of fraud within statutory period (Civ.Code § 1689 et seq.; Code Civ.Proc. § 338, subd. 4, as amended by St.1935, p. 1673; Gen.Laws Supp.1935, Act 3748, § 650).

3. Limitation of actions ⇐199(2)

In insurer's action commenced in 1936 to rescind health policies issued in 1925 on ground of fraud, trial court was required to determine as matter of law whether facts and circumstances leading to discovery of fraud existed more than three years prior to commencement of action, and, having determined that such facts did exist, demurrer to complaint was properly sustained (Civ.Code, § 1689 et seq.; Code Civ.Proc. § 338, subd. 4, as amended by St.1935, p. 1673; Gen.Laws Supp.1935, Act 3748, § 650).

4. Limitation of actions ⇐5(2)

General statute of limitations, sections relating to rescission, and Insurance Code permitting insurer to rescind at any time previous to commencement of action on contract, must be read together to mean that insurer may rescind at any time within statutory period provided no action has been commenced upon policy (Civ.Code, § 1689 et seq.; Code Civ.Proc. § 338, subd. 4, as amended by St.1935, p. 1673; Gen.Laws Supp.1935, Act 3748, § 650).

Appeal from Superior Court, Contra Costa County; Thomas D. Johnston, Judge.

Action by the Federal Life Insurance Company against Nathaniel Austin Cary. From a judgment for defendant after sustaining general and special demurrers, plaintiff appeals.

Affirmed.

Hadsell, Sweet, Ingalls & Lamb, of San Francisco, for appellant.

Donahue, Hynes & Hamlin, of Oakland, for respondent.

NOURSE, Presiding Justice.

On March 17, 1936, plaintiff commenced this action to rescind four noncancellable health insurance policies issued August 20, 1925. A demurrer both general and special was sustained with leave to amend. The plaintiff declined to amend, and the defendant had judgment.

On this appeal from the judgment the respondent rests upon two grounds: That the admitted fraud and misrepresentations in the application for the insurance was waived by plaintiff, and that its cause of

action is barred by the statute of limitations. If either ground is good, the judgment must be sustained.

The four applications for the insurance were all made in the month of July, 1925. The plaintiff was an insurance corporation having its principal place of business in Chicago, Ill; the defendant was a physician and surgeon practicing his profession in Oakland, Cal. In each application he represented that he was not then suffering and had not since the year 1921 suffered any illness, particularly bronchial asthma. These representations were admittedly false, and are conceded to have been material. At the same time, however it was represented that he was then receiving a permanent disability from the federal government for services in the World War "on account of a bronchial asthma secondary to a frontal sinus infection." It is alleged that on February 11, 1935, the defendant filed a claim with the plaintiff for disability under said policies due to bronchial asthma. Thereafter, the plaintiff made investigation of the records of the Veterans' Bureau and learned for the first time that defendant had suffered severe attacks of bronchial asthma in January, 1923, July, 1923, and October, 1924. Plaintiff thereupon gave notice of rescission.

On the issue of waiver, the respondent cites and relies upon Farrar v. Policy Holders Life Ins. Ass'n, 3 Cal.App.(2d) 87, 39 P.(2d) 229, 232. That was a case where the applicant for insurance had falsely represented his physical condition, but had at the same time notified the insurer that he was drawing a disability pension from the federal government as a veteran of the Spanish-American War. The insurer made no investigation and, in an action brought by the widow of the insured, the appellate court reversed a judgment in favor of the insurance company. In doing so it approved the accepted rule that: "An insurance company waives or is estopped to assert a violation of the terms of an insurance contract if the company, on being notified of the violation, remains silent and fails to object or to declare a forfeiture, or cancel or rescind the contract, within a reasonable time." In the same connection the court also said: "The law imposes upon the insured the duty of dealing honestly with the insurer. It is equally emphatic in requiring like honesty on the part of the insurer in its dealings with the insured and the beneficiary. Dishonesty on the part of either is frowned upon and appropriate penalties provided." One of the penalties provided as against the insurer is that he is bound unless he acts promptly or within a reasonable time after he learns of the fraud or has had the means of knowledge. The complaint here alleges that the insurer was given the information in 1925 that the insured was drawing a permanent disability pension for bronchial asthma. Inquiry at that time would have disclosed all that the insurer learned by its inquiry in 1935. It may be that when the policies were issued the insurer did not deem these facts of sufficient importance to avoid writing the policies. It may be that, as intimated in the Farrar Case, the silence of the insurer was part of a plan to lull the possible fears of the insured while saving its defenses to an action on the policy. Whatever the reasons prompting the failure of the insurer to act at that time, it may not be denied that the respondent took advantage of his position as a physician and surgeon and deliberately and falsely misrepresented his physical condition. At the same time the appellant was also culpable in permitting the policy to remain in force after it had the information which would have disclosed that the insured's physical condition was not what it had been represented to be. For these reasons we do not choose to add to the decisions excusing the fraud of the applicant in cases of this kind, and will rest our judgment on the second point raised—that the action is barred by the statute of limitations.

[1] The rule is general that where a party seeks relief from a fraud committed more than three years before his action is commenced the complaint must allege "the times and the circumstances under which the facts constituting the fraud were brought to his knowledge, so that the court may determine whether the discovery of these facts was within the time alleged." Lady Washington C. Co. v. Wood, 113 Cal. 482, 487, 45 P. 809, 810; Code Civ.Proc. § 338, subd. 4, as amended by St.1935, p. 1673. In Blumen v. Clayburgh, 10 Cal.App.(2d) 63, 65, 51 P.(2d) 102, 103, a case in which the same question arose on a demurrer to the complaint, we said: "In a case closely allied the Supreme Court, in Consolidated R. & P. Co. v. Scarborough, 216 Cal. 698, 703, 16 P.(2d) 268, 270, emphasized the necessity of pleading the facts and circumstances surrounding the discovery of the fraud complained of 'in order that the trial

court might readily determine whether or not the facts and circumstances leading to the discovery of the fraud existed for more than three years prior to the commencement of suit.' Numerous cases are there cited in support of the rule and the Supreme Court further emphasized, on the authority of Wood v. Carpenter, 101 U.S. 135, 140, 25 L.Ed. 807, and the California cases theretofore cited, that the means of knowledge are the equivalent of knowledge. Quoting from Bancroft v. Woodward, 183 Cal. 99, 108, 190 P. 445, 449, 'where a party has knowledge of facts of a character which would reasonably put him upon inquiry, and such inquiry, if pursued, would have led to a discovery of the fraud or other ground for rescission, he will be charged with having discovered the fraud or other ground as of the time he should have discovered it; that is, as of the time when he would have discovered it if he had with reasonable diligence pursued the inquiry when he should have done so.'"

[2, 3] Since the complaint here alleges that the fraud was discovered through an investigation of the records of the Veterans' Bureau in the year 1935, it is entirely conceivable that a similar investigation undertaken prior to the running of the statute might have likewise disclosed the fraud. There are no allegations showing why such investigation was not made at an earlier date or why it would not have disclosed the fraud prior to the running of the statute of limitations if made earlier. It does allege facts which show affirmatively that the appellant had the means of knowledge, that it had knowledge of facts of a character which would reasonably have put it upon inquiry, and that such inquiry if pursued would have led to a discovery of the fraud well within the statutory period. It was the function of the trial court to determine as a matter of law whether the facts and circumstances leading to the discovery of the fraud existed more than three years prior to the commencement of the action, and having determined that they did so exist, the demurrer was properly sustained.

[4] Appellant argues that the general statute of limitations (section 338, subd. 4, Code Civ.Proc.) and the Code sections relating to rescission (section 1689 et seq., Civ.Code) do not apply because section 650 of the Insurance Code (Deering's General Laws Supp.1935, Act 3748) permits an insurer to rescind "at any time previous to the commencement of an action on the contract." We read these sections together so that the latter should be interpreted as meaning that the insurer may rescind at any time within the statutory period providing no action has been commenced upon the policy. Section 650 is really a limitation on the right to rescind, rather than an extension of it.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



20 Cal.App.2d 364

KELLER v. CLEAVER.

Civ. 1622.

District Court of Appeal, Fourth District, California.

April 14, 1937.

1. New trial ⇐163(1)

Though judicial errors in connection with entry of order granting new trial may not be corrected after expiration of statutory time, clerical errors resulting in failure to enter an order which was actually made may be thus corrected.

2. New trial ⇐163(1)

Where it plainly appeared from so-called opinion of trial judge that it was his intention to order a new trial, failure of clerk to enter order *held* "clerical error" the correction of which by nunc pro tunc order was proper.

[Ed. Note.—For other definitions of "Clerical Error," see Words & Phrases.]

3. Appeal and error ⇐933(1)

Presumption that trial judge has a better opportunity to weigh evidence than appellate court reviewing written record *held* not to apply where judge who heard motion for new trial and entered order appealed from had not heard evidence, had not seen witnesses, and apparently did not have transcript of evidence before him.

4. Appeal and error ⇐933(4)

Where judge who heard motion for new trial entered an order nunc pro tunc granting new trial on ground of insufficiency of evidence, though original informal order

failed to express insufficiency of evidence as reason for new trial, appellate court would not presume that judge had intended to so specify in his original informal order, and would hold such specifications in later order as void, where judge had not heard evidence, seen witnesses, or had transcript of evidence.

5. Appeal and error ⇐1048(6)

In action for support of minor, wherein defendant's wife testified that she went to café where plaintiff worked and admonished her, sustaining of defendant's objection to plaintiff's question on cross-examination why wife took a gentleman with her when she went to café *held* not prejudicial where witness had testified to the same effect (Civ.Code, § 196a).

6. Evidence ⇐156

Court properly sustained defendant's objection to question, on cross-examination of physician, how privileged communications consisting of records and previous examination of plaintiff got into hands of defendant's attorney, where court had stopped defendant from going into those matters on first objection made by plaintiff.

7. Trial ⇐89

Court properly refused to strike out portion of physician's answer to question concerning general relation between general condition of man's health, or defendant's at time in question, and impotency, that after age of 50 many men are even then impotent who do not have such diseases as defendant had, where defendant was 71 years of age.

8. Trial ⇐89

Where trial occurred in March and April, 1935, motion by party asking question to strike answer on ground that answer was not responsive to the question would not lie.

9. Evidence ⇐558(4)

Court properly sustained defendant's objection to question on cross-examination of physician, which plaintiff claimed was proper as going to credibility of physician, whether it was customary for physicians to record both positive and negative findings, where physician was thoroughly cross-examined, since matter suggested by question was immaterial.

Appeal from Superior Court, Orange County; J. O. Moncur, Judge.

Action by Esther Keller against Arthur W. Cleaver. From orders granting the plaintiff a new trial, the defendant appeals.

Reversed.

See, also, 12 Cal.App.(2d) 546, 55 P.(2d) 1262.

Drumm, Tucker, Martell & Drumm, of Santa Ana, for appellant.

Joe Wapner, of Los Angeles, and McFadden & Holden, of Anaheim, for respondent.

BARNARD, Presiding Justice.

This is an action for the support of a minor, brought pursuant to section 196a of the Civil Code. The action was tried before Hon. H. G. Ames, a judgment for the defendant being entered on May 10, 1935. Notice of intention to move for a new trial on all statutory grounds was filed by the plaintiff on May 28. In the absence of Judge Ames the motion for a new trial was heard on July 11, 1935, by Hon. J. O. Moncur. On July 12, Judge Moncur signed and filed what is denominated an opinion, and which reads as follows:

"The above entitled matter is before the court on motion for a new trial after judgment rendered by the court in favor of the defendant, and the plaintiff is seeking a new trial. Not being the judge who tried the case, and not having the opportunity of seeing the witnesses, it is recognized both by me and by counsel on both sides that much difficulty is entailed in endeavoring to secure a proper grasp upon the necessary and material facts to enable the court to fairly determine whether a new trial should be granted.

"The nature of the action is one which necessarily involves alleged very close personal relations and is one of the class of actions in which there is a chance that no matter how conscientiously and fairly a court may endeavor to determine it, yet, nevertheless, there exists a possible result that in such determination a grave injury may be done one way or the other. I have endeavored in the brief time accorded to me to secure the best possible understanding necessary to secure a fairly adequate understanding upon which the determination of the question as to whether the motion for a new trial should or should not be granted.

"Counsel on both sides have apparently with entire fairness presented their respective views, and I am satisfied have

endeavored to assist the court in every way possible under the circumstances in reaching a conclusion in the matter.

"After hearing the arguments, reading the depositions and reviewing such evidentiary matter as was available, I have reached the conclusion that a new trial should be granted in this case. In so ordering, no intimation is intended that the trial judge in reaching the conclusion which he did was not actuated by a very fair and impartial judgment of the weight of the evidence, the credibility of the witnesses or of the law; nevertheless, a practically inescapable conclusion seems forced upon me that the interests of justice in such a case as this can best be subserved by a retrial of the case, and particularly in order that in such a case as this a great injury may possibly not be done to one party or the other as a retrial may demonstrate."

On July 23, the plaintiff gave notice to the defendant that the court had, on July 12, made and entered an order granting to the plaintiff a new trial. It is conceded that no formal order granting a new trial was entered by the clerk. On July 31 the defendant filed notice of appeal from this order with a request for a transcript. On August 26 Judge Moncur signed an order which was filed August 29, 1935, reading as follows:

"Whereas, a motion for a new trial was made by plaintiff in the above entitled case on or about July 11, 1935, and

"Whereas, the matter was duly argued by counsel for the respective parties hereto and submitted to the Court for its decision, and

"Whereas, the court on or about July 12th, 1935, decided the same, and

"Whereas, through an inadvertence a formal order on the hearing of said motion was not made or entered, it is therefore ordered, adjudged and decreed, that the following order be entered by the clerk of the above entitled court non pro tunc as of July 12th, 1935, to-wit:

"It is hereby ordered, that the motion for a new trial heretofore made by plaintiff be, and the same is hereby granted on the grounds that the evidence adduced at the trial of the cause was insufficient to justify the judgment."

The defendant appealed from this order and requested the preparation of a record. The two appeals have been consolidated and submitted upon one transcript and one set of briefs, with certain supplemental briefs.

[1, 2] The appellant contends that the so-called opinion filed on July 12, is not an order granting a new trial, that the order of August 29 was filed after the statutory time, and that, therefore, no order granting a new trial has ever been entered. It is well settled that while judicial errors, in connection with the entry of such an order, may not be corrected after the expiration of the statutory time, clerical errors resulting in a failure to enter an order which was actually made may be thus corrected. If, in the instant case, the judge hearing the motion had stated orally in open court that he had reached the conclusion that a new trial should be granted, we think it would have been the duty of the clerk to enter such an order. It plainly appears from the so-called opinion that it was the intention of the court to order a new trial. While the opinion, in itself, was not a formal order to that effect, it was sufficient to authorize the clerk to enter the order, and the failure of the clerk to do so was a clerical error. Under these circumstances the nunc pro tunc order was proper for the purpose of correcting this clerical error and it cannot be said that no order granting a new trial was entered.

The next question is as to the nature of the order granting a new trial; that is, whether the effect thereof is to grant a new trial because of errors of law only or on the additional ground of insufficiency of the evidence. Under section 657 of the Code of Civil Procedure it must be presumed that an order granting a new trial is not based upon the ground of insufficiency of the evidence unless that ground is specified in the order. That ground is not specified in the so-called opinion filed on July 12, but is included in the order filed on August 29. The question presented is whether the latter order is to be taken, in this respect, as merely curing a clerical error and not as an attempt to cure a judicial error.

[3, 4] A similar question has been decided in a number of cases which are discussed in Livesay v. Deibert, 3 Cal.App. (2d) 140, 39 P.(2d) 466. In that case all presumptions were taken in favor of the order and it was held that, under the circumstances there appearing, in the absence of evidence to the contrary, it must be

presumed that the trial judge found the error in question to be his own clerical error. In that case, not only did the trial judge know what was in his mind when he directed the entry of the original order but, having tried the case, he had full knowledge of all of the evidence. In the instant case the judge who heard the motion for a new trial had not heard the evidence, had not seen the witnesses, and apparently did not even have a transcript of the evidence before him. Under such circumstances, the usual presumption that a trial judge has a better opportunity to weigh evidence than is afforded to one who is reviewing a written record could not apply. It may be observed, in this connection, that so far as shown by the written record before us the preponderance of the evidence is in favor of the defendant and it is hardly possible to presume therefrom that the judge hearing the motion for a new trial would consider the same insufficient to justify the judgment. In deciding the motion for a new trial, if the so-called opinion is to be taken as deciding that motion, the judge gave his reasons and disclosed what was in his mind at the time and we are not left to conjecture or presumption with respect thereto. If this instrument, filed on July 12, is to be taken as a direction for the entry of an order granting a new trial, and otherwise no such direction was made within the time allowed, we think it affirmatively appears therefrom that the direction to enter the order was not made upon the ground that the evidence was not sufficient to justify the judgment. After recognizing that he is handicapped by not having seen the witnesses and heard the evidence, and stating that the nature of the case was such as to make it possible that an injustice might be done no matter how fairly and conscientiously the matter might have been determined by the trial court, the judge goes on to say that he has reached the conclusion that a new trial should be granted. He then proceeds to state that in so ordering he does not intend to intimate that the trial judge, in deciding the case, was not actuated by a very fair and impartial judgment as to the weight of the evidence. In effect, he then declares that, in spite of this, he believes that the interests of justice in such a case as this can best be subserved by a retrial. We think the instrument thus filed discloses that this judge did not at the time consider the evidence insufficient to justify the judgment. In this "opinion" he plainly indicates that he considers the evidence sufficient to sustain the judgment, but that "nevertheless" he thinks a new trial may demonstrate that an injury has been done. Having practically stated that he did not find the evidence insufficient, it must be taken that he was granting the motion on other grounds. The order filed on August 29 states that through inadvertence a formal order had not been made or entered, but contains no intimation that a clerical error had been made by the judge in reducing his intention to writing. With the evidence before us as to what was in the mind of the judge on July 12, when the opinion was filed, we cannot presume that something else was in his mind and that in making the order of August 29 he was determining that he had made a clerical rather than a judicial error in writing his "opinion." The record speaks for itself and there is not even a presumption to contradict it. We therefore hold that the order of August 29 was void and ineffective in so far as it attempted to add the specification of the insufficiency of the evidence as a ground for granting the motion for a new trial.

The only remaining question is whether the order granting a new trial may be sustained on the ground of errors of law. The respondent first asserted a claim of such errors in the last brief she filed, which sets forth sixteen specifications of error in sustaining and overruling objections to questions asked of witnesses and in denying motions to strike out portions of the answers to certain questions. All of the matters thus raised are trivial in nature, almost no argument is presented in support thereof, and in most instances inadequate quotations from or references to the transcript are made. We have, however, examined the surrounding portions of the transcript in an effort to discover what points are raised and what basis therefor exists.

[5] Because the rulings referred to in the others are so obviously correct as not to require comment, we will consider here only four of these specifications of error. Specification No. 12 is as follows:

"Mr. Wapner: Q. What was the reason that you took a gentleman with you to the Pig'n Whistle Café to admonish Miss Keller?

"Mr. Tucker: I object to that as calling for a conclusion of the witness, incompe-

tent, irrelevant and immaterial and argumentative.

"The Court: Sustained."

This question was asked of the wife of appellant. It is argued that this question went to the credibility of the witness and "if appellant's wife went to the café only to inform respondent that she had ascertained that she was a 'bad girl' why was it necessary to take a total stranger with her"? This argument discloses the purpose of the question. The witness had testified that she took a man with her to the restaurant. The argument now made could have been made in its proper place without an answer to the question, and no possible injury could have accrued to the respondent from the sustaining of the objection.

[6] The thirteenth specification is as follows:

"Q. Will you tell us how those privileged communications got into the hands of Mr. Cleaver's Attorneys?

"Mr. Drumm: We object to that as incompetent, irrelevant and immaterial.

"Mr. McFadden: I think it is very competent.

"The Court: The objection is sustained."

The only argument made is that the question goes to the credibility, the bias and prejudice of the witness. We are not even told who the witness was or what the privileged communications were. However, an examination of the transcript discloses that the witness was a doctor who was asked concerning his records and his previous examination of the respondent. The court stopped the appellant from going into these matters upon the first objection made by the respondent. Thereafter the respondent made this effort to bring the matter up again. Under the circumstances, no error appears.

[7,8] The fourteenth specification is as follows:

"Q. Would there be any general relation between the general condition of a man's health, or Mr. Cleaver's at that time, and impotency?

"Well, it's well known after the age of fifty many men are even then impotent who are not diseased and here is a patient who has stomatitis, endocarditis, arthritis of the spine and a hypertrophied prostate and a certain of sugar in his blood, all of which counts against being potent.

"Q. What is hypertrophy?

"Mr. Wapner: I move that the answer, except the last portion be stricken out as not responsive to the question. He refers to men of fifty without disease being impotent, that is not material."

The only argument here made is that "the condition of a man of 50 or more is wholly immaterial." The appellant was 71 years of age at the time here in question and it is fully apparent that the question was sufficiently related to him and his particular condition. Moreover, the motion to strike the answer was made on the ground that the same was not responsive to the question, which ground was not available to the respondent at the time of the trial, which occurred in March and April, 1935. People **v.** Sieber, 201 Cal. 341, 257 P. 64.

[9] The sixteenth specification is as follows:

"By Mr. Wapner: Q. In maintaining a record of a patient is it or is it not the usual custom and practice of doctors to record both positive and negative findings?

"Mr. Drumm: Just a minute, we object to that as incompetent, irrelevant and immaterial, not tending to prove or disprove anything in this case.

"The Court: Objection sustained."

It is argued that this question went to the credibility of the witness. Whether or not there was such a custom and whether or not it was followed by this particular doctor might have slightly affected the weight of his testimony, but it is difficult to see how it could affect his credibility as a witness. This doctor was thoroughly cross-examined and, in view of the record of that cross-examination, the matter suggested by the question appears to have been immaterial.

The nature of the sixteen specifications of error set forth by the respondent strongly suggests that this trial, which lasted a number of days was perhaps unusually free from error. Most of the rulings complained of were obviously correct, all relate to matters which were largely, if not entirely, immaterial, and no possible error thus appearing could be assumed to have af-

fected the result under all of the evidence shown by the record.

The orders appealed from are reversed.

We concur: MARKS, J.; JENNINGS, J.



20 Cal.App.2d 449

HOWARD v. STARKS et al.

Civ. 1823.

District Court of Appeal, Fourth District, California.

April 20, 1937.

1. Sales ⇐479(15)

Evidence *held* to justify judgment denying conditional seller of automobile truck and trailer recovery of balance of purchase price after property was repossessed and resold, on ground that truck and trailer had been returned to seller before first payment became due, and contract was rescinded.

2. Sales ⇐475

Assignment of contract for conditional sale of truck and trailer by seller to finance company would not preclude buyer from asserting rescission of contract as defense in action for balance of price after repossession and resale of truck, where contract was reassigned to seller by finance company before action was brought.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Earl C. Howard, as surviving partner of Earl C. Howard and R. B. Howard, copartners doing business under the firm name and style of the Fresno Trailer Company, against Edward E. Starks and another, partners, doing business under the firm name and style of the Starks & Ford Transportation Company. Judgment for defendant, and plaintiff appeals.

Affirmed.

C. M. Ozias and Bert M. Green, both of Fresno, for appellant.

Laurence B. Myers, of Fresno, for respondents.

BARNARD, Presiding Justice.

The plaintiff sold a truck and trailer to the defendants under a conditional sale contract. The property was repossessed and resold and this action was brought to recover the balance of the purchase price. The complaint alleged that the defendants had placed the property upon a vacant lot and had abandoned it. The court found in favor of the defendants, and the plaintiff has appealed from the judgment.

The appellant contends that certain findings are not supported by the evidence. While we think that no more than a conflict appears in each instance, all but one of the findings attacked are immaterial and that one only need be here considered. This finding is to the effect that it is not true that the respondents placed said personal property upon a vacant lot and abandoned the same, and that it is true that on June 1, 1935, prior to any default on the part of the respondents, they returned all of said property to the appellant, who then repossessed the same and rescinded the contract, and that it is true that the appellant forfeited all rights under the contract.

The equipment was sold on May 21, 1935, and the first payment under the contract came due on June 21, 1935. One of the respondents testified that when he purchased the equipment the appellant told him, "If the truck couldn't handle fifteen tons, you bring it back to us and there will be nothing said"; that he tried to haul "fifteen tons" and the frame of the truck broke; that he took the truck and trailer back to the appellant's garage and told the appellant that it would not do the work; that he returned the equipment to the appellant the last of May or the first of June; that he heard nothing more from the appellant for a week or so when the appellant tried to sell him another truck; that on another occasion the appellant told him they would have some other trucks in a few days "and we will see what we can work out on an Indiana"; that he went to the appellant's place of business later but found they did not have any Indiana trucks there; and that he heard nothing more from the appellant. He also testified that no demand was ever made upon him by any one for payment of any installment under the contract. From other evidence it appears that the appellant sold the truck and trailer to other parties.

[1] It appears, without conflict, that three weeks before the first payment on

the contract became due the truck and trailer were repossessed and resold and that no demand for payment was ever made upon the respondents. While a conflict appears with respect to a part of the circumstances surrounding the return of the truck, the evidence, with the reasonable inferences therefrom, is sufficient to support the finding in question.

[2] Some contention is made that the appellant could not have agreed to a rescission because the contract had been assigned by him to a finance company, and that the respondents had knowledge of this fact. It does not appear when the contract was assigned to this finance company. While there is evidence that the respondents knew that the appellant intended to assign the contract to this finance company, there is a decided conflict as to whether they knew that the assignment had been made, if in fact it was made before the rescission took place. In any event, this entire matter is immaterial, since the contract was reassigned to the appellant by the finance company before this action was brought.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.



HUSSMAN et al. v. SOUTHERN PAC. CO. et al. *

Civ. 11293.

District Court of Appeal, Second District, Division 2, California.

April 13, 1937.

Hearing Granted by Supreme Court June 10, 1937.

1. Appeal and error ⇐930(1)

On appeal from judgment for plaintiffs, evidence would be viewed most favorably to plaintiffs.

2. Railroads ⇐346(5)

Presumption of due care of one injured at railroad crossing becomes part of evidence and remains such until it is overcome by wholly irreconcilable evidence offered by party relying on presumption.

3. Death ⇐58(1), 104(1)

In action for death of motorist who collided with rear of freight train at crossing, where there were no eyewitnesses to collision, plaintiffs' evidence showing facts a short time prior to collision and showing use of due care by motorist did not dispel presumption of due care, and submission in instruction of presumption as evidence was not error.

4. Railroads ⇐351(12)

In action for death of motorist who collided with rear of freight train at crossing, instruction that jury could adopt presumption of motorist's due care in preference to declaration of any number of witnesses who did not produce conviction in jury's minds *held* not error.

5. Trial ⇐296(4)

In action for death of motorist who collided with rear of freight train at crossing, instructions relating to motorist's proper speed and other statutory duties and to character of street intersecting railroad and purpose of Legislature in creating highway thereover *held* not error, in view of other instructions (St.1935, p. 181, § 525).

6. Railroads ⇐351(1)

In action for death of motorist who collided with rear of freight train at crossing, instruction that railroad was required "to insure" reasonable public safety in use of street at place of accident *held* not error, as against contention that instruction imposed on railroad duty to insure public against railroad's negligence in use of public thoroughfare.

7. Railroads ⇐351(12)

In action for death of motorist who collided with rear of freight train at crossing, instruction that one who is not negligent in exercise of ordinary care in operating automobile is entitled to rely on presumption that others will exercise ordinary care *held* proper.

8. Railroads ⇐351(12)

In action for death of motorist who collided with rear of freight train at crossing, instruction that if motorist was lawfully operating automobile and exercising ordinary care he had right to assume that train would be so operated as to permit him to operate his automobile without endangering life, limb, or property *held* proper.

*For subsequent opinion see 77 P.2d 1072.

9. Appeal and error ⇐215(3)

Where ordinance was received in evidence without objection, objections could not be urged on appeal to instruction which was mere repetition of ordinance.

10. Trial ⇐240

In action for death of motorist who collided with rear of freight train at crossing, instruction requiring jury to consider certain hypothecated facts in determining motorist's contributory negligence *held* properly refused, as being argumentative.

11. Trial ⇐240

It is not error for trial court to refuse instruction which is argumentative in form.

12. Railroads ⇐348(1)

Where motorist driving between twenty-five and thirty miles per hour on boulevard in rain collided with unlighted rear of freight train at crossing, resulting in motorist's death, evidence *held* to sustain verdict awarding damages for motorist's death, as against contention that railroad's negligence was not shown.

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by Alice D. Hussman and another against the Southern Pacific Company and others. From a judgment for plaintiffs, defendants appeal.

Affirmed.

W. I. Gilbert, of Los Angeles, for appellants.

Roland G. Swaffield, of Long Beach, and A. J. Getz, of Los Angeles, for respondents.

McCOMB, Justice.

This is an appeal from a judgment in favor of plaintiff after a trial before a jury.

[1] Viewing the evidence most favorable to plaintiff (Ah Gett v. Carr, 3 Cal. App. 47, 48, 84 P. 458), the facts in the instant case are:

December 29, 1935, Ralph B. Hussman, who was the husband of Alice D. Hussman and father of Ralph B. Hussman, Jr., plaintiffs herein, while driving his automobile at a speed of between 25 and 30 miles an hour in a southerly direction on Alameda street, collided with the rear end of a freight train of defendant's, standing on Alameda street where it intersects Eighth street in the city of Los Angeles. He died as a result of injuries received in the accident. At the time of the accident and shortly prior thereto it was raining. There were no lights on the rear end of the train, but there was a large street arc light suspended near where the accident occurred.

Defendant relies for reversal of the judgment on the following propositions:

First. The trial court committed prejudicial error in instructing the jury as follows:

I. "Under the law of this state, the decedent, Ralph B. Hussman, is presumed to have used reasonable care for his own concern and safety on the occasion in question. This presumption is in itself evidence in the plaintiffs' behalf and shall prevail and control your deliberations until, and unless, it is controverted or overcome by satisfactory evidence. In this connection, I further charge you that you are at liberty to adopt this presumption in preference to the declaration of any number of witnesses who do not produce conviction in your minds."

II. "You are instructed that the only duty of the deceased at the time and place of the accident in this case to use reasonable care in relation to the speed at which he was traveling, was that he should not drive at a speed greater than was reasonable or prudent, having due regard for the traffic on and the surface and width of the highway, and in no event at a speed which endangered the safety of persons or property; and before you can find the deceased guilty of any negligence whatsoever by reason of his speed, you would have to find that he violated the above duty."

III. "You are instructed that under the law of this state, even though an express maximum for the speed of motor vehicles is prescribed, a rate of speed in excess of such limit does not of itself constitute negligence, but all the circumstances of a particular occasion or event must be taken into consideration in determining whether a given speed is or is not consistent with the exercise of ordinary care."

IV. "You are instructed that it is provided by section 525 of chapter 7, division IX of the Vehicle Code of California [St. 1935, p. 181], *as follows:*

"'525. Drive on Right Side of Roadway. Upon all roadways of sufficient width a vehicle shall be driven upon the right half of, and as close as practicable to the right-

hand curb or edge of, such roadway, except as follows:

"'(a) When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement.

"'(b) When placing a vehicle in a lawful position for, and when such vehicle is lawfully making, a left turn.

"'(c) When the right half of a roadway is closed to traffic while under construction or repair.

"'(d) Upon a roadway designated and signposted for one-way traffic or upon a roadway divided into three or more clearly marked lanes for traffic.'

"(If you find that on the occasion in question, the deceased violated this section of the Vehicle Code, such violation, if any, would constitute negligence as a matter of law on the part of said deceased at time in question.)"

V. "You are instructed that Adameda street at the time and place of the accident was a boulevard and through highway and that the purpose of the Legislature in creating such a highway was to facilitate traffic upon it."

VI. "You are instructed if you find from the evidence in this case or if you are instructed by me that the defendant Southern Pacific Company at the time of this accident had a franchise to operate on Alameda street at the place of the accident in this case, or had a right of way at said place, nevertheless, you are instructed that such franchise or right of way either expressly or by implication carries with it the duty to use reasonable precautions required by the conditions of public travel and required to insure reasonable public safety in the use of Alameda street at the place of the accident in this case."

VII. "You are instructed that one who is not negligent in the exercise of ordinary care in the operation of an automobile is entitled to rely upon the presumption that others will exercise ordinary care and it is not negligence to fail to anticipate danger which can come only from a violation of law or duty upon the part of another."

VIII. "You are instructed that if you find that at the time of the accident the deceased was lawfully operating his automobile and exercising ordinary care in the operation thereof then the deceased had the right to assume that the defendants would so operate their train so as to permit deceased to operate his automobile without endangering his life, limb or property."

IX. "You are instructed that at the time of the accident in this case there existed a certain ordinance of the city of Los Angeles and said ordinance was in full force and effect and provided substantially as follows, to-wit:

"Section 1. It shall be unlawful for any person, firm or corporation to run, propel or operate, or to cause or permit to be run, propelled or operated, any railroad car or train of railroad cars upon, along, or across any public street, or other public place, or across any railroad track, interurban railroad track or street railway track, during the period from one hour after sunset to one hour before sunrise, unless there is attached to such car or train, on the end thereof toward the direction in which such car or train is proceeding, a light of the kind and type hereinafter described, showing a bright while *light visible in the direction in which such car or train is proceeding. Such light shall have a reflector and shall be equal in power to the kind usually and customarily used by the car inspectors of steam railroads operating in the city of Los Angeles.*

"Provided, however, that the provisions of this ordinance shall not apply to any such car or train if a competent flagman proceeds *such car or train carrying a bright* while *light visible in the direction in which such car or train is proceeding; and provided further, that the provisions of this ordinance shall not apply to any such car or train when the same is crossing any public street or other public place, or when the same is crossing any railroad track, interurban railroad track or street railway track, if such street, place or track is, at the time of such crossing, protected by an interlocking device or apparatus.*

"If you find that on the occasion in question the defendants violated this ordinance, such violation would constitute negligence as a matter of law on the part of said defendants."

Second. The trial court committed prejudicial error in refusing to instruct the jury thus:

"You are instructed that negligence is always a question of time, place and circumstance, and in determining whether or not the defendants were guilty of negligence in the operation of their train, or the deceased negligent in the operation of

his automobile, you should take into consideration the fact, if you should find it to be a fact, that the street was lighted; the fact, if you should find it to be a fact, that the tracks of the defendant were plainly visible; the fact, if you should find it to be a fact, that fusees were on the rear end of said train; the fact, if you should find it to be a fact, that trainmen were there with lighted lanterns; the fact, if you should find it to be a fact, that the train itself would be visible if the automobile lights on the automobile of the deceased were properly equipped, or by the street lights; the fact, if you should find it to be a fact, that the deceased knew of the existence of the track, and that the trainmen in charge of defendant's train had the right to assume that the deceased would inform himself fully as to whether or not he could drive safely along or upon said track, together with all of the other facts and circumstances in connection therewith; and if after a full consideration of the testimony you should determine that the deceased was guilty of any negligence which directly or proximately contributed to the happening of the accident in any degree, however slight, your verdict will be for the defendants, notwithstanding you may believe that the defendants were guilty of negligence at the time and place of the accident."

Third. There was no substantial evidence to sustain the implied finding that defendants were negligent.

The instruction set forth in paragraph I of defendant's first proposition, it is contended, was erroneous for two reasons: (1) That, in view of the fact that plaintiffs introduced testimony regarding the manner in which the accident occurred, it was improper to submit as evidence to the jury the presumption that decedent used reasonable care for his own concern; and (2) that the instruction imposed an erroneous burden of proof upon defendants, in that it required them to overcome such presumption by evidence which "produced convictions" in the minds of the jury.

[2, 3] The first objection to this instruction is not valid, for the rule is settled that the presumption of care becomes part of the evidence of a case and remains such until it is overcome and dispelled by evidence offered by the party relying thereon, which is wholly irreconcilable with such presumption. Smellie v. Southern Pacific Co., 212 Cal. 540, 555, 299 P. 529; Lahey v. Southern Pac. Co. (Cal.App.) 61 P.(2d) 461; Lam Ong v. Pacific Motor Trucking Co. (Cal.App.) 60 P.(2d) 480. In the instant case there were no eye witnesses to the accident and all testimony introduced by the plaintiffs was entirely consistent with the presumption that decedent used due care for his own safety. At best the evidence of plaintiff merely showed facts existing a short time prior to the collision between decedent's car and the rear of defendant's freight train.

[4] The second objection is likewise untenable, this precise point having been answered adversely to defendant's contention by our Supreme Court in Smellie v. Southern Pacific Co., supra, 212 Cal. 540, at page 551, 299 P. 529.

[5] The instructions set forth in paragraphs II, III, IV, and V of defendant's first proposition must be read in conjunction with the other instructions given to the jury, and, when so considered, they fully and fairly instructed the jury as to the law on the subject purported to be covered by them.

[6] The word "insured" as used in the instruction set forth in paragraph VI of plaintiff's first proposition, when read in connection with the entire instruction is not susceptible of the interpretation that defendant Southern Pacific Company, endeavors to put thereon, to wit, that it imposed upon it the duty to insure the public against its negligence in the use of a public thoroughfare. The jury must have understood the instruction as simply meaning that one enjoying a franchise to use a public highway is required to take such precautions as are necessary to insure reasonable safety to the public.

[7, 8] The instruction set forth in paragraphs VII and VIII of plaintiff's first proposition are accurate statements of the principles of law embodied therein. Robinson v. Western P. R. R. Co., 48 Cal. 409, 421; Crabbe v. Rhoades, 101 Cal.App. 503, 517, 282 P. 10.

[9] The objections to the instruction set forth in paragraph IX of plaintiff's first proposition will not be considered by this court, since the instruction was merely repetition of an ordinance which had been received in evidence without objection. It was, therefore, properly before the jury, and defendant may not for the first time on appeal urge an objection thereto.

[10, 11] The instruction set forth in plaintiff's second proposition was properly refused for the reason that it was argumentative. The rule is settled that it is not error for the trial court to refuse an instruction argumentative in form. In re Estate of Clark, 180 Cal. 395, 398, 181 P. 639.

[12] Turning to defendant's final proposition, an examination of the record discloses there was substantial evidence considered in connection with such inferences as the jury may have reasonably drawn therefrom to sustain the findings of fact upon which the verdict of the jury was necessarily predicated. Thatch v. Livingston, 13 Cal.App.(2d) 202, 56 P.(2d) 549; Koeberle v. Hotchkiss, 8 Cal.App.(2d) 634, 48 P.(2d) 104; Leavens v. Pinkham & McKevitt, 164 Cal. 242, 245, 128 P. 399.

The judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.



20 Cal.App.2d 467

HEISER v. McALPINE et ux.

Civ. 10179.

District Court of Appeal, First District, Division 1, California.

April 22, 1937.

1. Limitation of actions ⇐149(1)

Acknowledgment, to remove bar of limitation, must be direct, distinct, unqualified, and unconditional admission of debt which party is liable and willing to pay, and is not such as may be deduced by inference from promise or offer to pay part of debt, or to pay debt in particular manner, or at specified time, or upon specified conditions (Code Civ. Proc. § 360).

2. Limitation of actions ⇐151(3)

When statute of limitations has barred remedy upon an original obligation, and acknowledgment or promise made after such time is relied upon, action is not upon original obligation, but upon acknowledgment and implied promise raised by law, or upon new express promise (Code Civ.Proc. § 360).

3. Limitation of actions ⇐151(3)

If acknowledgment or promise is made while original obligation is legally enforceable, and no conditions are attached to promise, action, though brought after limitation otherwise would have barred remedy against original obligation, is still upon original obligation, which becomes a "continuing contract" under statute removing bar of limitation under such circumstances (Code Civ.Proc. § 360).

4. Limitation of actions ⇐151(5)

Where new promise is made while original obligation is legally enforceable and is not a general promise to pay obligation according to its tenor and terms, but a promise coupled with a condition, and action is brought after statute of limitations would have barred remedy upon original obligation, action is upon substituted conditional promise, and not upon original obligation (Code Civ.Proc. § 360).

5. Limitation of actions ⇐149(2)

Instrument executed before running of four-year limitation against action on note whereby maker acknowledged indebtedness and agreed to pay note by assignment of corporate stock upon return and cancellation of note *held* not to remove bar of limitation, since new promise must be unconditional to remove bar (Code Civ.Proc. § 360; § 337, subd. 1, as amended by St.1933, p. 2116).

6. Limitation of actions ⇐148(2)

Where debtor in writing treats debt as subsisting and one which he is liable and willing to pay, law implies promise to pay according to tenor and terms of debt; but, if acknowledgment is accompanied by qualifying expressions or conditions such as repel idea of contract to pay except to extent or upon conditions named, no implied promise to pay absolutely is created.

Appeal from Superior Court, Santa Clara County; Wm. F. James, Judge.

Action by Elizabeth Heiser against J. K. McAlpine and wife. From a judgment against named defendant only, he appeals.

Reversed, with directions.

H. E. Schmidt, of Bakersfield, and Fitzgerald & Johnson, of Gilroy, for appellant.

D. T. Jenkins and Maurice J. Rankin, both of San Jose, for respondent.

KNIGHT, Justice.

Plaintiff sued on a promissory note given by defendants J. K. and Adelaide McAlpine to Sophie H. Alexander, and upon the latter's death distributed by the probate court to plaintiff. Defendants pleaded the bar of the Statute of Limitations. Code Civ.Proc. § 337, subd. 1, as amended by St. 1933, p. 2116. The cause was tried on a written stipulation of facts, and the trial court held that the action was barred as to Adelaide McAlpine, but not as to J. K. McAlpine. Accordingly judgment was entered against the latter for the amount of the principal of the note, plus interest and attorney's fees; and from said judgment he has appealed.

The note was dated March 1, 1927, and made payable one year after date. The action was not filed until November 3, 1934, which as will be noted was more than five years and nine months after the date of the maturity of the note; but it was alleged in the complaint, "That on the 25th day of February, 1932, the Defendant J. K. McAlpine, in a writing signed by him, acknowledged said indebtedness." The instrument introduced in evidence in support of the foregoing allegation and upon which respondent relies to take the case out of the operation of the statute, was signed by appellant alone and was as follows: "Whereas, J. K. McAlpine and Adelaide G. McAlpine, husband and wife, made, executed and delivered to S. H. Alexander their promissory note in the principal sum of $3,000.00; and, Whereas, the statute of limitations is about to run against said promissory note; and, Whereas, said J. K. McAlpine, one of the makers of said note, has entered into an agreement with Malcolm Brock, L. S. Robinson, C. W. Robinson, Louis Banducci and Amerigo Pierucci, which agreement provides for the incorporation and the formation of a corporation under the laws of the State of California to be called the Bakersfield Memorial Park, Inc. (a limited corporation); * * * and, Whereas, upon the completion of the terms and conditions of said agreement, said J. K. McAlpine shall become entitled to 15,000 shares of Class B stock at the par value of $10.00 per share; Now, therefore, for and in consideration of the immediate cancelation and return of said note to the makers thereof, the undersigned hereby agrees that upon receipt of Class B stock above described, he will assign and transfer to S. H. Alexander 500 shares thereof. In witness thereof, the undersigned has hereunto set his hand this 25th day of February, 1932. Acknowledged—J. K. McAlpine." Said document was delivered to the payee on the date of its execution, but she made no reply thereto, nor did appellant afterwards tender the stock.

[1-4] Section 360 of the Code of Civil Procedure provides that no acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged thereby. Said section is a re-enactment of section 31 of the former Statute of Limitations, and in the early case of McCormick v. Brown, 36 Cal. 180, 95 Am. Dec. 170, it was held: "The acknowledgment referred to in the statute is not such as may be deduced by inference from a promise or an offer to pay a part of the debt, or to pay the whole debt in a particular manner, or at a specified time, or upon specified conditions. The acknowledgment, say the cases, must be a direct, distinct, unqualified, and unconditional admission of the debt which the party is liable and willing to pay." That case has been cited and quoted with approval in a number of later cases, among them being Nelson v. Nelson, 202 Cal. 598, 261 P. 999; Clunin v. First Federal Trust Co., 189 Cal. 248, 207 P. 1009; Rodgers v. Byers, 127 Cal. 528, 60 P. 42, 43; Foristiere v. Alonge, 98 Cal.App. 563, 277 P. 367; and in Rodgers v. Byers, supra, the court declared the law upon the subject of conditional acknowledgments to be as follows: "It seems to be well settled in this state: (1) That when the statute of limitations has barred the remedy upon the original obligation, and an acknowledgment or a promise made after such time is relied upon, the action is not upon the original obligation, but is upon the new acknowledgment, and the implied promise raised by the law, or is upon the new express promise. McCormick v. Brown, 36 Cal. 180 [95 Am.Dec. 170]; Chabot v. Tucker, 39 Cal. 434; Biddel v. Brizzolara, 56 Cal. 374; Lambert v. Schmalz, 118 Cal. 33, 50 P. 13. (2) If the acknowledgment or the promise be made while the original obligation is legally enforceable, and, if no conditions be attached to the promise, then the action, though brought after the statute of limitations otherwise would have barred the remedy against the original obligation, is still upon the original obligation, which becomes 'a

continuing contract' under section 360 of the Code of Civil Procedure, because the bar of the statute has been lifted and removed. McCormick v. Brown, 36 Cal. 180; Chaffee v. Browne, 109 Cal. 211, 41 P. 1028; Southern Pacific Co. v. Prosser, 122 Cal. 413 [52 P. 836] 55 P. 145. (3) But, upon the other hand, in the case of a new promise, made while the original obligation is legally enforceable, if that promise be not a general promise to pay the obligation according to its tenor and terms, but is a promise coupled with any condition, and an action is brought after the statute of limitations would have barred the remedy upon the original obligation, the action of plaintiff is then upon the substituted, conditional promise, and not upon the original obligation." Citing Curtis v. City of Sacramento, 70 Cal. 412, 11 P. 748. To the same effect see 37 Cor.Jur., pp. 1104, 1118.

[5] Here, as will be observed, the instrument in question contained no promise, general or otherwise, to pay the note according to its tenor or terms, but on the contrary the specific promise set forth therein was conditional—that in consideration of the immediate cancellation and surrender of the note, appellant would liquidate the same in a particular manner, namely, by the assignment and transfer of corporate stock thereafter to be issued. The instrument was executed while the original obligation was legally enforceable, and the action was brought after the statute of limitations would have barred the remedy upon the original obligation. Therefore, under the doctrine declared in Rodgers v. Byers, supra, and Curtis v. City of Sacramento, supra, respondent may not recover on the original obligation.

[6] It is doubtless the law, as respondent contends, that where a debtor in writing treats a debt as subsisting and one which he is liable and willing to pay, the law will imply therefrom a promise to pay it according to its tenor and terms. Foster v. Bowles, 138 Cal. 346, 71 P. 494, 649; Searles v. Gonzalez, 191 Cal. 426, 216 P. 1003, 28 A.L.R. 78; Concannon v. Smith, 134 Cal. 14, 66 P. 40. But, as pointed out in Curtis v. City of Sacramento, supra, if the acknowledgment be accompanied (as here) by such qualifying expressions or conditions as repel the idea of a contract to pay, except to the extent or upon the conditions named, no implied promise to pay absolutely is created. Citing Biddel v. Brizzolara, 56 Cal. 374. Says the court, in this respect: "The acknowledgment must be a direct, unqualified, and unconditional admission of a debt which a party is liable and is willing to pay. The most positive acknowledgment of a pre-existing debt is insufficient if accompanied by a declaration which is inconsistent with an intention to pay." Citing McCormick v. Brown, supra, and Chabot v. Tucker, 39 Cal. 434. In so holding the court adopted with approval the following language used by the trial court: "When there is a written acknowledgment of a debt, not coupled with any promise, the law will imply a general promise to pay; but, when the acknowledgment is accompanied by a particular promise, the law will imply none other. In such case the acknowledgment is not direct and general, but qualified and conditional; and, if it contains any cause of action, that cause must be based upon the contract which the instrument expressly states." In other words, the writing relied upon as a valid acknowledgment must be taken and considered as a whole. The law will not permit the creditor to accept the acknowledgment and reject the condition or qualification attached thereto. 37 Cor.Jur. p. 1119. This is so because it is not the acknowledgment itself, but the promise which the law implies from the acknowledgment, that is controlling. Wood on Limitations (4th Ed.) vol. 1, pp. 409-411.

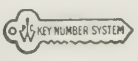
Nor does it matter, in determining the validity of the acknowledgment, whether it was made before or after the statute has run against the original obligation. The distinction affects only the remedy; and in either case, in order to recover according to the terms and tenor of the original obligation, the acknowledgment must be unconditional. Foristiere v. Alonge, supra; Curtis v. City of Sacramento, supra; Rodgers v. Byers, supra.

The two cases cited and relied upon by respondent are materially different in their facts from the present case. In First National Bank of Park Rapids v. Pray, 86 Cal.App. 484, 260 P. 933, the acknowledgment was made up of a series of correspondence between the parties, running over a number of years, wherein the debtor at all times treated the obligation as subsisting, and one which he was liable and willing to pay. It was held, therefore, that the law implied a promise to pay according to the tenor and terms of the obligation. The case of Southern Pacific Co. v. Prosser, 122 Cal. 413, 52 P. 836, 55 P. 145, is clos-

er to the point at issue. But there the latter relied upon as constituting the acknowledgment amounted, as the court there pointed out, to an unqualified admission of an existing debt coupled with an expressed desire to pay the same; and it was held, therefore, that since the request made therein by the debtor that he be allowed to pay the obligation in work was not proposed as a condition, such request did not impair the effect of the unqualified acknowledgment of the debt which the debtor had expressed a willingness to pay.

The judgment as to appellant is reversed, with directions to the trial court to revise its conclusions of law and to reenter judgment in favor of appellant in accordance with the views herein expressed.

We concur: TYLER, P. J.; CASHIN, J.



20 Cal.App.2d 347

WASHKO et al. v. STEWART et al.

Civ. 11284.

District Court of Appeal, Second District, Division 2, California.

April 14, 1937.

Hearing Denied by Supreme Court June 10, 1937.

1. Appeal and error ⇐1012(1)

Ordinarily, appellate court will not pass on weight or preponderance of evidence, and will uphold finding of trial court if there is substantial evidence in support thereof, even though appellate court would have decided otherwise, if it had been the trier of the facts.

2. Appeal and error ⇐1011(1)

Appellate court will uphold trial court's findings supported by some substantial evidence, notwithstanding that there is no conflict in evidence, if inferences fairly deducible therefrom are such that different conclusions might rationally be drawn therefrom by equally sensible and impartial men.

3. Appeal and error ⇐996

Appellate court will not upset finding on ground that trial court's inference from evidence is improbable or more likely to be untrue than true, if trial court had before it evidence on which unprejudiced mind might reasonably have reached the conclusion which was reached.

4. Appeal and error ⇐996

Appellate court will not interfere with trial court's findings where parties stipulate to probative facts, or where probative facts are set forth in findings and different inferences might reasonably be drawn therefrom.

5. Automobiles ⇐244(26)

Whether employer-employee relation existed between automobile company and driver who struck pedestrian while delivering to owner, under oral contract with company, an automobile which company had serviced, was question of mixed law and fact to be proved like any other question of fact.

6. Master and servant ⇐1

Provisions requiring person to be present at rehearsals, fixing wages and hours of employment by operating schedule, for use of salary checks in payment of services rendered, and for right of immediate discharge, are not conclusive in determining whether person is "employee," but are circumstances to be considered in determining question.

7. Automobiles ⇐244(29)

Evidence that driver who picked up and delivered automobiles to automobile company for servicing received designated sum for each automobile handled without any minimum guarantee, that company furnished driver with compensation insurance, that driver used his own motorcycle and paid cost of its operation, and that driver had no fixed lunch hour or quitting time and received no extra pay for overtime, *held* to show that driver was an "independent contractor" and not "employee" of automobile company, precluding recovery from automobile company for death of pedestrian whom driver struck while returning to owner an automobile which company had serviced.

[Ed. Note.—For other definitions of "Employee" and "Independent Contractor," see Words & Phrases.]

8. Appeal and error ⇐1010(1)

In reviewing sufficiency of findings to support judgment, regard will be had to ultimate facts found and not to mere probative facts which are not shown by findings

to be the only facts proved and from which alone the court finds the ultimate facts, and in absence of such showing, the mere circumstance that some of probative facts are inconsistent with ultimate facts will not prevent ultimate facts from controlling.

WOOD, J., dissenting.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Mildred Washko and Albert H. Washko, Jr., coadministratrix and coadministrator of the estate of Albert B. Washko, deceased, against Joel Stewart, the Howard Automobile Company, and another. From a judgment in favor of the Howard Automobile Company, the plaintiffs appeal.

Affirmed.

See, also, 67 P.(2d) 151.

Alford P. Olmstead and Wendell P. Hubbard, both of Los Angeles, for appellants.

Gibson, Dunn & Crutcher and Philip C. Sterry, all of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This is an action for damages for personal injuries resulting from an automobile collision. The automobile had been sent by the owner to the defendant Howard Automobile Company for servicing. At the time of the collision the car had been serviced and was being driven back to the owner by the defendant Stewart. The trial court rendered judgment against the driver of the car and against the owner of the car, but denied judgment against the Howard Company under a finding that the driver of the car was not at the time of the accident acting as an employee of the Howard Company, but was an independent contractor. The appeal is from the judgment in favor of Howard Company. We are asked to reverse the judgment upon the ground that there is insufficient evidence to sustain said finding.

[1-4] While the question of the sufficiency of the evidence to support a finding may be presented for review, the duty of the appellate court stops when it has determined that there is some substantial evidence to support it. Ordinarily, on appeal the court does not and should not pass upon the weight or preponderance of evidence, and it will uphold the finding of the trial court if there is some substantial evidence to support it, even though it would have decided otherwise if it had been the trier of the facts. 2 Cal.Jur. 912, 913. No rule of appellate procedure is more firmly settled than this. In such cases the court is concerned only with the single inquiry, Does the record contain any substantial evidence tending to support the finding assailed? and if there is such evidence, which is not inherently improbable, the answer must always be that the trial court has conclusively decided the question. The same rule applies though there be no conflict in the evidence if the inferences fairly deducible therefrom are such that different conclusions might rationally be drawn therefrom by equally sensible and impartial men. The court will not upset a finding because in its judgment the inference drawn by the trial court is improbable or more likely to be untrue than true. In such case the court's duty begins and ends with the inquiry whether the trial court had before it evidence upon which an unprejudiced mind might reasonably have reached the same conclusion which was reached. The same rule applies also where the parties stipulate to the probative facts or where probative facts are set forth in the findings and different inferences may reasonably be drawn therefrom. 2 Cal.Jur. 934 to 936.

[5] The question whether or not the relation of employer and employee existed at the time of the accident, under the oral contract in this case, was a question of mixed law and fact to be proved like any other question of fact. Hillen v. Industrial Accident Comm., 199 Cal. 577, 250 P. 570. In the case of La Franchi v. Industrial Accident Comm., 213 Cal. 675, 3 P.(2d) 305, 306, our Supreme Court said: "In Hillen v. Industrial Accident Comm., 199 Cal. 577, 580, 250 P. 570, this court held that whether or not the relation of employer and employee exists is a question of mixed law and fact, a finding to that effect being binding on this court; and that, only where there is an entire absence of evidence to support the commission's finding and award should it be set aside." See, also, Pacific Gas & Electric Co. v. Industrial Accident Comm., 180 Cal. 497, 499, 181 P. 788.

It must be kept in mind, therefore, that the real question before us for decision is not, Did the relation of employer and employee exist between the driver and the Howard Company at the time of the accident? but, Was there any substantial evidence before the trial court to sustain the finding that such relationship did not exist? We set this forth so particularly for the

reason that the real question is not stated in the plaintiffs' briefs, and is not discussed therein. Plaintiffs content themselves with marshaling the facts and circumstances in evidence against said finding as though this court were a jury. Plaintiffs conclude their briefs with a recitation of nine circumstances which tend to prove that the relation of master and servant existed between the driver and the said defendant. We must keep the true question in mind.

The law determining when the relation of employer and employee exists is clear and precise. Section 2009 of the Civil Code states it as follows: "A servant is one who is employed to render personal service to his employer, otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter, who is called his master." "The word 'servant' is generally synonymous with the word 'employee.'" Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 159 P. 721, 723. In that case the court said: "It is true that many authorities specify 'control' of the person performing work as the means of differentiating service from independent employment. The test of 'control,' however, means 'complete control.'" In Moody v. Industrial Accident Comm., 204 Cal. 668, 269 P. 542, 543, 60 A.L.R. 299, the court said: "The test of control means complete control, and we must carefully distinguish between authoritative control and mere suggestion as to detail." See, also, Chicago, etc., Ry. Co. v. Bond, 240 U.S. 449, 36 S.Ct. 403, 60 L.Ed. 735, which is cited and approved in Barton v. Studebaker Corp., 46 Cal.App. 707, 189 P. 1025; Bohanon v. James McClatchy Pub. Co. (Cal. App.) 60 P.(2d) 510; Brosius v. Orpheum Theater Co. (Cal.App.) 60 P.(2d) 156, 158. In the Brosius Case, which was decided by this court, the plaintiff contracted to furnish the defendant a comedy cycling act. The trial court held that the plaintiff was not an employee but an independent contractor, and this court sustained the judgment, for the reason that the "defendant did not have complete control over plaintiff. * * * Defendant did not have the right to control the number or size of the wheels used or the speed or direction in which they were to be propelled."

It is only in the application of the law to the evidence, when a fact finder is attempting to determine facts, that there is any difficulty.

We wish also to emphasize that the law as to what constitutes the relationship of master and servant is not necessarily stated in that mass of cases, usually cited in the briefs when a question of this character is before a court, which take section 2009 of the Civil Code for granted or overlook it and laboriously discuss the facts and circumstances of each individual case as to whether the relationship exists, and vaguely, if at all, discuss the real question, i. e., whether or not there is any substantial evidence in the record to sustain the finding of the trial court. Such cases almost uniformly, and rightly so, uphold the findings of the trial court on the question, but in almost all instances they would have and should have upheld the findings of the trial court if the findings had been the opposite. Such cases churn and grind together and settle down at the bottom of the ocean of jurisprudence, to form a conglomerate strata which has no more texture or strength than a geological conglomerate often seen by the side of the road. In this connection see Koeberle v. Hotchkiss, 8 Cal.App.(2d) 634, 48 P.(2d) 104. It would be well in almost all instances if such questions were handled with the terse words of the less than two-page opinion of La Franchi v. Industrial Accident Comm., supra: "It is apparent from the foregoing brief survey of the evidence that the record contains some testimony tending to support the employee theory."

In this connection we wish also to say that the law of this case is not necessarily stated in the case of Hammel v. Keehn (Cal.App.) 63 P.(2d) 1165, which defendant Howard primarily and confidently relies upon for an affirmance, which is more nearly in line with the instant case than other cases which have been cited to us, and which as to the facts is more nearly on all fours with the instant case.

[6] In this connection also we wish to emphasize that no particular fact or circumstance has been held to be conclusive in determining the question whether a person is or is not an employee. A provision requiring plaintiff to be present at rehearsals does not establish such relationship. Brosius v. Orpheum Theater Co., supra. A provision fixing wages and hours of employment by an operating schedule is not conclusive. Moody v. Industrial Accident Comm., supra. A provision for the use of salary checks in payment for the services rendered is not conclusive. Lillibridge v. Industrial Accident Comm., 4 Cal.App.(2d) 237, 241, 40 P.(2d) 856; Los Flores S. Dist. v. Industrial Accident Comm., 13 Cal.App.(2d) 180, 56 P.(2d) 581. Even a provision for the right

of immediate discharge is question of such relationship. For illustration, in the cases of Peters v. California B.-L. Ass'n, 116 Cal. App. 143, 2 P.(2d) 439; Pryor v. Industrial Accident Comm., 186 Cal. 169, 198 P. 1045, and cases cited. But all of these facts and circumstances, as well as others, are considered evidence bearing upon the question of such relationship. For illustration in the case of Peters v. California Bldg.-Loan Ass'n, 116 Cal.App. 143, 2 P.(2d) 439, 443, the court said: "As evidence of the nature of the relationship existing between the association and Peters, there is the fact that Peters received no definite compensation, only commissions; that the automobile used by him in soliciting his customers was his own property; and that he paid the expense of its maintenance and care and for the gasoline necessary to run it, together with all his other expenses."

[7] It is the custom of this court when confronted with a question of this nature to merely say, if it be so, that in our view there is substantial evidence to sustain the finding of the trial court. In the rare instances in which we do not sustain a finding of fact, we set forth our reasons with particularity. In the instant case we would ordinarily be content with the statement that in our view there is substantial evidence to sustain the finding; but unfortunately we find ourselves in disagreement in the decision of the question. (We would be more than human if we did not sometimes disagree.) For that reason, the majority will now set forth some of the facts and circumstances in evidence which sustain a finding that at the time of the accident the defendant Stewart was not acting as an employee of defendant Howard Company, but was an independent contractor. In extenuation we wish to say that our failure to agree also accounts for this long and laborious opinion.

The following facts and circumstances in evidence tend to sustain the finding of the trial court: Prior to the time of the accident the driver, Stewart, and one Phillips were managers of the Cycle Corporation which picked up and delivered automobiles for the defendant Howard Company pursuant to a contract wherein the corporation occupied the relation of independent contractor. This corporation went into bankruptcy and thereupon Stewart and Phillips orally offered to handle the Howard Company's pick-up and delivery service on the old basis of the corporation contract, with the exception that the Howard Company was to furnish Stewart and Phillips with compensation insurance. This offer was accepted and Stewart and Phillips commenced the pick-up and delivery of cars in the uniforms they had worn under the Cycle Corporation. For each car handled they received 50 cents or $1.00, the rate depending upon specified zones. There was no minimum guarantee. In performing under this contract, Stewart and Phillips used their own motorcycles. They paid all the cost of operating the motorcycles, including the cost of gasoline, oil, and repairs. There was no fixed quitting time or lunch hour for these men, no fixed hour at which Stewart was to stop work at the end of the day, no extra pay for overtime.

The evidence was that in picking up and delivering cars Stewart and Phillips used their own individual discretion as to the route to be followed. They had a right to follow main traffic arteries or side streets, a dangerous route or a safe one. They were not in any sense under the direction and control of the company in this regard.

The evidence was that when Stewart was waiting for an opportunity to call for or deliver cars he was accustomed to do odd jobs around the shop, but this work was not compulsory, and when he did such work he was paid on an hourly basis—not by the month, or week or even by the day. He received payments semimonthly in the form of a so-called salary check, which check included the amounts coming to him for pick-up and delivery service, together with pay for the hours spent on odd jobs while waiting for work under his contract. Under this contract, if there were no cars he received no compensation. If the expenses incurred by him exceeded the amount received, the loss fell on him. His profits might be large or small or he might even suffer a loss, depending upon the number of orders he received and the expense involved. We will not argue the strength of the above evidence. We are content to set it forth so that it may speak for itself.

There were other circumstances in evidence from which the inference might possibly have been drawn that Stewart was an employee. But we are not engaged in parading conflicting circumstances in order to judge of their weight.

[8] In addition to the finding of the ultimate fact, that at the time of the happening of the accident the defendant Stewart was not engaged in the performance of his duties as an employee of the defendant Howard

Company, the court in other paragraphs made many probative findings, most of which have been set out in our recital of the evidence tending to sustain the finding of ultimate fact. Included were several other probative facts which might be considered inconsistent with the ultimate fact, and the final contention of the plaintiffs is that "a judgment founded upon a purported finding of an ultimate fact which is inconsistent with probative facts previously found, upon which the ultimate fact was based, is unsupported by the findings and must be reversed." This contention does not accurately state the law which is applicable here. The applicable law is clearly and succinctly stated and the cases collected in 2 California Jurisprudence at page 872. It would seem almost that the editors had gathered the language together for the very purpose of this case. "In reviewing the sufficiency of the findings to support the judgment, regard will be had to the ultimate facts found, and not to mere probative facts, which are not shown by the findings to be the only facts proved and from which alone the court finds the ultimate facts. In the absence of such showing, the mere circumstance that some of the probative facts are inconsistent with the ultimate facts will not prevent the ultimate facts from controlling. And whenever the facts found are such as might authorize different inferences therefrom, it will be presumed that the inference made by the trial court was one that will uphold rather than defeat the judgment. In such case the appellate court will not draw from those facts any inference of fact contrary to that which might have been drawn by the trial court for the purpose of rendering its judgment." 2 Cal.Jur. 872, and vol. 1, Ten Year Supp. 528, 529.

Judgment affirmed.

I concur: McCOMB, J.

WOOD, Justice.

I dissent. This is an appeal by plaintiffs, legal representatives of the estate of Albert B. Washko, deceased, from a judgment in favor of Howard Automobile Company of Los Angeles. Albert B. Washko, a pedestrian, was killed in the evening of November 9, 1933, while in the act of crossing the intersection at Virgil avenue and Lockwood street in the city of Los Angeles. Plaintiffs sued the owner of the car, defendant Binkert, the driver of the car, defendant Stewart, and the Howard Company, alleging that Stewart was an employee of the Howard Company engaged at the time of the accident in the line of his duty. The cause was tried before the court without a jury. Judgment was entered in favor of plaintiffs against Binkert in the sum of $5,000 and against Stewart in the sum of $12,000 and in favor of defendant Howard Automobile Company of Los Angeles. On a separate appeal filed by defendant Stewart we are this day filing an opinion and order affirming the judgment as to defendant Stewart. Washko et al. v. Stewart et al., 67 P.(2d) 151.

Defendant Binkert purchased a Pontiac automobile from the Howard Company under an agreement which provided for the servicing of the car by the seller after it had been driven 500 miles. The car was delivered to the Howard Company and after the completion of the servicing was being returned to Binkert when the accident occurred. The issue involved in this appeal concerns the nature of the arrangement under which Stewart was returning the car, whether in the capacity of employee or independent contractor.

Stewart and one Phillips had formerly organized a corporation known as the Cycle Auto Corporation and had engaged in the business of delivering automobiles at a flat rate which varied in accordance with the zones in which the deliveries were made. The corporation had made deliveries for the Howard Company, but it became bankrupt and thereafter Stewart and Phillips individually applied to the Howard Company for work. An arrangement was made whereby Stewart should deliver automobiles at the same rates which had been formerly charged according to the zones of delivery, the rate for the delivery of the car in the zone of the Binkert residence being 50 cents. Stewart was to furnish his own motorcycle and gasoline. The Howard Company carried compensation insurance upon Stewart as an employee. Stewart was obliged to report for work at the Howard Company's plant each morning at 8 o'clock and was obliged to take instructions from the foreman as to the order in which pickups and deliveries were to be made. Stewart was required to remain on duty until the deliveries and pickups for the day were completed. Other deliverymen besides Stewart and Phillips were engaged in the same work. When Stewart was not engaged in deliveries and picking up automobiles, he would do other work about the shop of the Howard Company, such as washing cars and running errands, and for this work he was paid on an

hourly basis. Testimony was offered on the part of the defense that the performance of this other work was not compulsory. Stewart was listed on the books of the Howard Company as a deliveryman and was paid with salary checks of the company which were in the same form as checks used in the case of the employees of the company. On the face of a salary check admitted in evidence appears the following: "Indorsement of this check by payee acknowledges receipt in full of salary to October 31, 1935, inclusive." On the books of the Howard Company appears the following: "Date employed 3/15/33."

In my opinion the uncontradicted testimony conclusively shows that Stewart was an employee rather than an independent contractor. Civ.Code, § 2009. An independent contractor is one who in rendering services exercises an individual employment or occupation and represents his employer only as to the results of the work and not as to the means whereby it is to be accomplished. May v. Farrell, 94 Cal.App. 703, 271 P. 789, 793. A well-considered opinion is to be found in Chapman v. Edwards, 133 Cal.App. 72, 24 P.(2d) 211, 213, where the court upheld a verdict based on the allegation that the owner of a truck who was engaged to haul dirt by the load was an employee rather than an independent contractor. In that case the court gave this definition: "An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer except as to the result of the work." It was pointed out that "there was no obligation upon him [the driver] to take any dirt, nor was there any liability imposed upon or assumed by him if he chose not to haul. Likewise there was no obligation upon Edwards Bros. to furnish sufficient dirt to load the truck, nor was there any obligation on Edwards Bros. to continue the employment for any period. It seems generally conceded that a test in determining whether a person employed to do certain work is an independent contractor or a mere servant is the control over the work which is reserved by the employer. The power of the employer to terminate the employment at any time is a strong circumstance tending to show the subserviency of the employee, since it is incompatible with the full control of the work usually enjoyed by an independent contractor. Perhaps no single circumstance is more conclusive to show the relationship of an employee than the right of the employer to end the service whenever he sees fit to do so." The court further pointed out that the real test by which to determine whether a person is acting as the servant of another is to ascertain whether he was subject to such person's orders and control and was liable to be discharged for disobedience or misconduct.

In May v. Farrell, supra, the issue turned on the question whether one Farrell was an employee of the appellant corporation. Farrell was employed to sell automobiles for the corporation on commission. He was required to report at a fixed hour each morning and attend a daily sales meeting. He used his own automobile. In case his services were not satisfactory he could be discharged at any time. In upholding the implied finding of the jury that Farrell was an employee the court said: "The fact that a certain amount of freedom of action is inherent in the nature of the work does not change the character of the employment where the employer has general supervision and control over it." The court further held that the fact that the salesman furnished his own transportation did not affect his status as an employee. In Weinberg v. Clark, 120 Cal.App. 362, 8 P.(2d) 164, a case in which the trial was without a jury, the court found that the driver of the automobile involved in the accident, who was an automobile salesman working on a commission basis, was not an employee of his codefendant. The judgment in favor of the employer was reversed, the reviewing court holding that the evidence failed to establish that the driver was an independent contractor. In Hillen v. Industrial Accident Comm., 199 Cal. 577, 250 P. 570, 571, a case in which a workman was engaged in shingling at a certain price per thousand shingles, the court said: "One of the best tests to determine whether the relation is that of an independent contractor or that of employer and employee is the right of control. It is not the fact of actual interference with the control, but the right to interfere, that makes the difference between an independent contractor and a servant or agent." In Hartford A. & I. Co. v. Industrial Accident Comm., 93 Cal.App. 313, 269 P. 733, the applicant was injured while soliciting prospective purchasers for a real estate company. She received as compensation $2 for each person whom she might interest in the property and cause to visit the land held for sale, plus commission on any sale she might make. She was not limited to any territory in which

she might work and the company did not furnish her with the names of people to interview. She had no specific hours in which to work, but was required to telephone the office each morning and attend a meeting for the instruction of salesmen each Monday morning. She was not permitted to work for any other real estate company. The court upheld an award in her favor based on the finding of the commission that she was an employee rather than an independent contractor. See, also, Dillon v. Prudential Ins. Co. of Am., 75 Cal.App. 266, 242 P. 736; George v. Chaplin, 99 Cal.App. 709, 279 P. 485; Press Pub. Co. v. Industrial Accident Comm., 190 Cal. 114, 210 P. 820; Smith v. Fall River Joint Union High School District, 118 Cal.App. 673, 5 P.(2d) 930.

Respondent relies upon the case of Hammel v. Keehn (Cal.App.) 63 P.(2d) 1165, 1166. That case is easily distinguishable from the case at bar. The driver, Keehn, was an employee of a copartnership which contracted with two different automobile houses to make deliveries of automobiles. One of these houses was the defendant Kaiser Bros. The court said: "They charged a flat rate by zones for the service thus rendered, presenting bills twice a month to each agency, then dividing the proceeds among the partners. So far as appears, there was no agreement which bound them to respond to a call nor which required either service agency to call them rather than obtain or return an automobile by some other medium. Each call was thus a new contract, although its terms were to be found not in freshly uttered words, but in the recognized practice which repeated contracts had established." Under its contract with the copartnership, Kaiser Bros. could not call upon Keehn for his individual services, nor was Keehn subject to discharge by Kaiser Bros. Keehn was not required to devote all of his time to Kaiser Bros. who had no right to exercise control over his work. On the other hand, Keehn was subject to control by the copartnership which employed him. In the case at bar Stewart, as also the other deliverymen, was required to remain on duty at the plant of the Howard Company until his work was finished for the day. He was required to furnish individual services and to take instructions from the company's foreman. The company had the right to exercise control over his work and could terminate his employment at any time. The company carried compensation insurance upon Stewart, listed him among its employees, and paid him for his labor by the hour when he was not engaged in delivering cars. The Howard Company stresses the point that Stewart had the right to select the route he should take in making deliveries of cars. As is pointed out in May v. Farrell, supra, the fact that a certain amount of freedom is inherent in the nature of the work does not change the nature of the employment where the employer has general supervision and control over it. Certainly the Howard Company was required to deliver Binkert's car promptly and had no right to divert the car to some other direction than that which would promptly bring about its return to the owner. Likewise Stewart was obliged to return the car to the owner promptly and by the most feasible route. A chauffeur regularly employed on a full-time basis to drive a car for his employer would not lose his status as an employee in following directions to meet his employer at a certain location if in doing so he should be given the right to select the street-route by which to drive the car to its destination. Even mechanics who are employed by the hour to perform labor are given a certain amount of freedom of action as regards the tools to be used. Such freedom of action is inherent in the nature of their work. So, also, such freedom of action as was allowed Stewart was inherent in the nature of his work.

During the portion of the day in which Stewart was washing cars and receiving compensation on an hourly basis he was unquestionably an employee. The change in his work from washing a car on an hourly basis to making a delivery at a flat rate did not transform him from employee to independent contractor.

In finding VIII the trial court found that Stewart was not engaged in the performance of his duty as an employee of the Howard Company. This finding involves a question of mixed law and fact. Hillen v. Industrial Accident Comm., supra. But in findings VII and XI the court detailed the facts of the employment substantially as set forth herein. In Wallace Ranch W. Co. v. Foothill D. Co., 5 Cal.(2d) 103, 53 P.(2d) 929, 936, the court said: "It was formerly the rule in this state that where two findings on an essential fact are conflicting, neither can be relied upon to support the judgment. Moody v. Newmark & Edwards, 121 Cal. 446, 53 P. 944; Fanta v. Maddex, 80 Cal.App. 513, 252 P. 630. It is also well settled, however, that when a

general finding conflicts with a special finding, the latter controls." The finding contained in finding VIII is a finding of an ultimate fact which in my opinion is inconsistent with specific facts found in findings VII and IX. In my opinion finding VIII is not supported by the evidence and must give way to the specific facts elsewhere found by the court. Under the circumstances here shown, the purported finding number VIII should be treated as an erroneous conclusion of law. "A general finding, drawn as a conclusion from facts previously found, cannot stand if the specific facts do not support it." Savings & L. Soc. v. Burnett, 106 Cal. 514, 39 P. 922, 929. See, also, McKay v. Gesford, 163 Cal. 243, 124 P. 1016, 41 L.R.A.(N.S.) 303, Ann.Cas. 1913E, 1253.

In my opinion the judgment as to defendant Howard Automobile Company of Los Angeles should be reversed.



20 Cal.App.2d 345

WASHKO et al. v. STEWART et al.

Civ. 11281.

District Court of Appeal, Second District, Division 2, California.

April 14, 1937.

1. Appeal and error ⇐1011(1)

Trial court sitting without a jury must decide issues of fact presented by conflicting testimony.

2. Appeal and error ⇐1010(1)

Findings must be sustained by appellate court if there is substantial evidence to support such findings.

3. Appeal and error ⇐989

In determining whether findings are supported by evidence, evidence tending to contrary conclusion will be disregarded.

4. Automobiles ⇐244(6, 50)

Evidence that motorist who struck pedestrian crossing street at intersection was negligent, and that pedestrian was not contributorily negligent, warranted recovery for pedestrian's death.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Mildred Washko and Albert B. Washko, Jr., coadministratrix and coadministrator of the estate of Albert B. Washko, deceased, against Joel Stewart and others. From the judgment, Joel Stewart appeals.

Affirmed.

See, also, 67 P.(2d) 144.

Gibson, Dunn & Crutcher and Philip C. Sterry, all of Los Angeles, for appellant Joel Stewart.

Wendell P. Hubbard and Alford P. Olmstead, both of Los Angeles, for respondents.

WOOD, Justice.

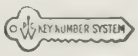
This action was commenced by the legal representatives of the estate of Albert B. Washko, deceased, to recover damages for the death of the decedent caused by the negligent driving of an automobile by defendant Stewart. The car was owned by defendant Binkert and had been delivered to defendant Howard Automobile Company of Los Angeles to be serviced. At the time of the accident Stewart was returning the car to Binkert. The owner of the car, Binkert, the driver, Stewart, and Howard Automobile Company were all made parties defendant. The cause was tried before the court sitting without a jury and judgment rendered against defendant Binkert in the sum of $5,000 and against defendant Stewart in the sum of $12,000. Judgment was entered in favor of defendant Howard Automobile Company of Los Angeles. This appeal is presented by defendant Stewart. A separate appeal has been filed by plaintiffs from the judgment in favor of the Howard Company.

[1-4] The accident occurred in the evening of November 9, 1933, at the intersection of Virgil avenue and Lockwood street in the city of Los Angeles. The decedent, a pedestrian, was in the act of crossing the street at the intersection as defendant Stewart drove the automobile into the intersection. The trial court found that Stewart was guilty of negligence and that the decedent was free from negligence. It is contended that these findings are not supported by the evidence. The evidence is conflicting and it was the duty of the trial court to decide the issues of fact presented by the conflicting testimony. Having in mind the rule that the findings must be sustained by an appellate court if there is substantial evidence to support them, we

have examined the record and are satisfied that there is sufficient evidence, considered in connection with such inferences as the trial court would reasonably draw therefrom, to sustain the findings made. Evidence tending to a contrary conclusion must be disregarded in passing upon the question whether the findings are supported by the evidence. We therefore refrain from further discussion of the evidence. Thatch v. Livingston, 13 Cal.App. (2d) 202, 56 P.(2d) 549; Koeberle v. Hotchkiss, 8 Cal.App.(2d) 634, 48 P.(2d) 104; Leavens v. Pinkham & McKevitt, 164 Cal. 242, 128 P. 399.

The judgment is affirmed as to appellant Stewart.

We concur: CRAIL, P. J.; McCOMB, J.



20 Cal.App.2d 423

ANGELUS SECURITIES CORPORATION v. BALL et al.

Civ. S. C. 37.

District Court of Appeal, Second District, Division 1, California.

April 19, 1937.

As Modified May 17, 1937.

Hearing Denied by Supreme Court June 17, 1937.

1. Corporations ⇐383

Under Delaware statutes providing that business of every corporation organized thereunder should be managed by board of directors, Delaware corporation could act only through medium of board of directors (Rev.Code Del.1915, § 1923, as amended by 36 Del.Laws, c. 135, § 4).

2. Corporations ⇐404(1)

Ordinarily, in absence of statutory or charter authority, vice president of corporation does not by virtue of office possess authority to transfer corporation's securities in transaction of which objective is to buy in corporation's own capital stock.

3. Corporations ⇐316(1)

President and treasurer of corporation who received securities belonging to corporation from vice president in return for corporation's stock could not defeat subsequent claim of corporation for restoration of securities as bona fide holders for value without notice, since their position as officers and directors of corporation charged them with notice of nature of transaction.

4. Principal and agent ⇐177(3)

Owners of stock who exchanged stock for securities belonging to corporation in transaction negotiated by president of corporation as their agent were charged with knowledge of president of corporation as their agent concerning unauthorized nature of transaction, since agent should have communicated facts within knowledge to principals, in absence of which principals were deemed to have had knowledge possessed by agent.

5. Corporations ⇐307

Stockholders in corporation had right to rely on reciprocal good faith of directors and officers in management of affairs of corporation.

6. Corporations ⇐307

Acts of directors of corporation are scanned in light of principles defining relationship between trustee and cestui que trust.

7. Corporations ⇐312(3)

Directors of corporation were without right to take from corporation securities with which to purchase stock that would enable part of directors to assume undisputed control of corporation.

8. Corporations ⇐426(2)

Ratification of contract can never be made for corporation by same person who wrongfully assumed power to make contract.

9. Corporations ⇐426(4)

Board of directors who approved unauthorized transfer of securities of corporation in exchange for corporation's own stock *held* incapable of subsequently ratifying transaction so as to defeat corporation's claim against directors based thereon.

10. Corporations ⇐319(8)

Question of liability of directors of Delaware corporation for unauthorized transfer of corporation's securities to two of directors in exchange for stock and of liability of stockholders who received securities in exchange for their stock *held* for jury (Rev.Code Del.1915, § 1923, as amended by 36 Del.Laws c. 135, § 4).

11. Corporations ⇐319(8)

Question of liability of directors of Delaware corporation for conspiracy to ex-

change securities of corporation for stock of corporation in order to enable such directors to obtain undisputed control of corporation *held* for jury (Rev.Code Del.1915, § 1923, as amended by 36 Del.Laws c. 135, § 4).

12. Corporations ⇐319(8)

Evidence of liability of two directors of Delaware corporation and of two stockholders of corporation who dealt through one of such directors for conspiracy to exchange stock owned by them for securities of corporation in order to enable other directors of corporation to obtain undisputed control of corporation *held* insufficient for jury (Rev.Code Del.1915, § 1923, as amended by 36 Del.Laws c. 135, § 4).

13. Corporations ⇐308(1)

Director or officer of corporation is not entitled to a salary per se and cannot receive salary unless properly voted by board of directors at meeting at which there is a quorum present without counting his vote and at which majority, not counting director affected, voted for salary.

14. Corporations ⇐308(5)

Directors of corporation would be liable to corporation for return of salaries paid to themselves pursuant to separate resolutions at which each of directors voted for salary to be paid to other director but refrained from voting on resolution concerning his individual salary, where votes of all directors except individual director whose salary was immediately concerned was necessary to constitute quorum.

15. Corporations ⇐312(5)

Directors of Delaware corporation who exchanged stock owned by them for securities of corporation in unauthorized transaction with another director *held* not liable to corporation for secret profit realized by such other director by sale of part of stock so obtained after directors who transferred stock had resigned their offices and withdrawn entirely from corporation (Rev.Code Del.1915, § 1923, as amended by 36 Del. Laws c. 135, § 4).

16. Corporations ⇐310(1)

Ordinarily only grounds on which directors or other officers of corporation can be held liable for acts of other officers are that they participated therein or were negligent in supervising corporate business or were negligent in appointment of wrongdoer, and director cannot be held liable as such for wrongs of other corporate officers or agents after he has ceased to sustain relation of director to corporation.

17. Trial ⇐142

Nonsuit should be granted only when, accepting full force of evidence adduced, together with every reasonable inference favorable to plaintiff which may be drawn therefrom and excluding all evidence in conflict therewith, it appears that law precludes plaintiff from recovering judgment under such circumstances.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Angelus Securities Corporation against Bertrand L. Ball and others. From the judgment, the plaintiff appeals.

Reversed in part, and affirmed in part.

John Perry Wood and Stanley Arndt, both of Los Angeles, for appellant.

Loeb, Walker & Loeb, of Los Angeles (Earl C. Adams, Henry Duque, and Herman F. Selvin, all of Los Angeles, of counsel), for respondents Eva M. Luton, Jean L. Ferguson, and Catherine Lyon.

WHITE, Justice pro tem.

This is a suit by plaintiff, a Delaware corporation, authorized to do and doing business solely in the state of California, against six of its former officers and directors (Harriss, Ball, Cruickshank, Woodward, Crowe, and Breslin) and the executrix (Eva Luton) of the estate of a seventh director (Luton), involving certain transactions that took place in 1931. Jean L. Ferguson and Catherine Lyon are also named defendants, they being the mother and daughter, respectively, of director Luton, and are alleged to have received some of the property here involved.

The first cause of action is against all defendants, and in effect alleges that defendants Ball, Luton, Cruickshank, Harriss, Woodward, Crowe, and Breslin, as officers and directors of plaintiff, and in control and domination of its affairs, without right or authority, and illegally, caused and permitted the corporation to diminish and impair its capital assets and to pay out $47,348.17 of its capital assets to directors Luton and Cruickshank and to defendants Ferguson and Lyon, in exchange for 470 shares of the preferred stock and 235 shares of the common stock of plain-

tiff corporation theretofore owned by Cruickshank, Luton, Ferguson, and Lyon; that the facts were concealed from plaintiff, from the other directors, and from the creditors and stockholders; and that when discovery was made, plaintiff repudiated the transaction, served notice of repudiation, tendered back everything plaintiff had received, and demanded restoration of the securities.

The second cause of action is similar to the first, except that it alleges a conspiracy among the defendants (with the exception of Breslin) to accomplish the matters set forth in the first cause of action. A sixth cause of action is similar to the second, except that it sets forth an additional matter of concealment not set forth in the first and second causes of action.

The third cause of action is against directors Ball, Harriss, Woodward, and Crowe, and seeks return of certain salaries alleged to have been improperly and fraudulently paid by themselves as officers to themselves as individuals. The fourth and fifth causes of action seek to recover from defendants Ball, Cruickshank, and Luton $2,500 in secret profits alleged to have been received and retained by Ball, with the aid of Cruickshank and Luton, in connection with the exchange of the Luton-Cruickshank-Ferguson-Lyon stock for the alleged assets of the corporation.

Defendant Crowe was not served, and the case was dismissed as to defendant Breslin immediately after the latter had testified at the trial.

At the conclusion of plaintiff's case at the trial, a nonsuit was granted as to all defendants on the first, second, third, and sixth causes of action, and as to all defendants except Ball on the fourth and fifth causes of action. The trial then proceeded as to defendant Ball on the fourth and fifth causes of action, resulting in a judgment against the latter for $2,500 secret profits, and from which judgment Ball has appealed; but that is the subject of a separate appeal and is not here involved.

Plaintiff corporation prosecutes this appeal from the order granting the motions of defendants Lyon, Ferguson, Cruickshank, Luton, Harriss, and Woodward for a nonsuit as to all causes of action, and granting the motion of defendant Ball for a nonsuit as to the first, second, third, and sixth causes of action, and also from the judgment in favor of defendants Harriss and Woodward, as well as from the judgment in favor of defendants Luton, Ferguson, and Lyon; and from the judgment in favor of defendant Cruickshank; also from that portion of the judgment in favor of defendant Ball on the first, second, third, and sixth causes of action; and from that portion of said judgment in which no relief was granted plaintiff against defendant Ball other than judgment in the sum of $2,500, with interest thereon, on the fourth and fifth causes of action.

Epitomizing the material facts disclosed by the record, we find that plaintiff is a Delaware corporation with an authorized capital stock of 10,000 shares of preferred stock of a par value of $100 per share, and 10,000 shares of common stock of no par value. By its charter the corporation was authorized to "purchase, hold, sell and transfer the shares of its capital stock; provided it shall not use its funds or property for the purchase of its own shares of capital stock when such use would cause any impairment of its capital. * * *" On the date here in question, April 15, 1931, there were actually issued and outstanding 3500 shares of plaintiff corporation's preferred stock and 4,282 shares of its common stock.

Defendant C. R. Luton, who died prior to the commencement of this action, was a shareholder, president, and director of plaintiff corporation from its inception until April 15, 1931. Defendants Jean L. Ferguson and Catherine Lyon are the daughter and mother, respectively, of the deceased director, Luton. Defendants Cruickshank, Ball, Harriss, Woodward, and Crowe were officers and directors of plaintiff corporation.

It appears that early in 1931 dissension had broken out between two groups of plaintiff corporation's directors, Woodward, Crowe, Harriss, and Ball constituting one group, with Luton and Cruickshank making up the other. From the evidence it appears that directors Ball, Woodward, Crowe, and Harriss were desirous, as Harriss testified, of getting directors Luton and Cruickshank "out of the picture." An approach was made to Luton and Cruickshank by Ball, who offered them some unimproved property for their stock, but the latter refused to make the exchange. About this time directors Ball, Woodward, Crowe, and Harriss voted as such directors to terminate the salaries of directors Luton and Cruickshank, in the sum of $500 and $200 per month, respectively, as president and secretary. Directors Luton and Cruickshank voted "no" on this proposal. It appears that plaintiff

corporation at about this time was the owner of a lot of trust deeds coming to it as the result of its business activities, which consisted of dealing in the purchase and sale of such instruments. Reference to the record indicates that Ball approached Luton and Cruickshank with a proposition to trade their stock to him in exchange for some trust deeds, and this proposition was accepted by the latter. An agreement had been executed by plaintiff corporation, through defendant Harriss as vice president, with Ball, under the terms of which it was agreed that in consideration of Ball's purchasing from the corporation certain trust deed notes "more fully set out in our letter to you of April 10th, 1931," for the sum of $47,-348.17, the corporation guaranteed to purchase from Ball 470 shares of its preferred stock and 235 shares of its common stock, paying Ball therefor the sum of $47,-630.58. On the afternoon of April 15, 1931, Ball obtained the securities from plaintiff corporation, took them to Cruickshank's office and turned over to the latter and defendant Luton the securities, receiving in return from them 1,235 shares of the common and 470 shares of the preferred stock of plaintiff corporation. Ball then turned over to plaintiff corporation the 470 shares of preferred and 235 shares of common stock, keeping for himself 1,000 shares, for which, as far as the record discloses, he personally paid nothing, having received the same in return for the securities of the corporation. The 1,000 shares he later sold to defendant Harriss for $2,-500. In connection with this transaction between plaintiff corporation and director Ball, two checks passed. Defendant Harriss, as vice president of the plaintiff corporation, gave Ball its check for $47,630.58, and received his check for $47,348.17. These checks were drawn on the same branch of the California Bank. Neither Ball nor plaintiff corporation had sufficient money in the bank to meet these checks, and arrangements were made with the bank whereby in due course the checks cleared against each other.

Thus we see that the corporation divested itself of the trust deed securities and in addition thereto issued its check to Ball and Ball issued his check to the corporation. From this we find the corporation dispossessing itself of its securities and receiving nothing in return. That same afternoon the resignations of Luton and Cruickshank as officers and directors of plaintiff corporation were accepted. Defendant Ball was thereupon elected president in the place of Luton, and Crowe secretary-treasurer in the place of Cruickshank. It appears that the common stock, without nominal or par value, possessed the exclusive voting power, and the preferred stock was not entitled to vote upon the election of directors or upon any questions affecting the management of the affairs of the corporation; provided, however, that whenever the corporation failed for a period of eighteen months to pay 7 per cent. dividends upon the preferred stock, then the holders of the preferred stock would be entitled to the exclusive voting rights. This right of the preferred stockholders, however, did not accrue until May, 1933, at which time it was exercised. It further appears that after obtaining the Luton and Cruickshank stock, as aforesaid, the board of directors voted ten-year contracts each to directors Ball and Crowe, the former as general manager for ten years at a salary of $500 per month, and the latter as financial adviser for ten years at $500 per month; while Harriss was made manager of the sales department for ten years at $675 per month; and Woodward was named manager of the mortgage loan department at a monthly salary of $500. These same last-named directors, it will be remembered, voted on March 16, 1931, to reduce overhead expenses by taking Luton and Cruickshank off the pay roll of the corporation, effective April 1. When the preferred stockholders came into control by reason of the failure of the corporation to pay them 7 per cent. dividends on such preferred stock, this action was commenced.

[1-3] Appellant's first contention is that the securities here in question belonging to the corporation could only be delivered to Ball or Luton and Cruickshank upon authorization of the board of directors, and that there is in the record no evidence of such authorization. The Delaware General Corporation Law (section 9, chapter 65 [section 1923] Rev.Code 1915, as amended by 36 Del.Laws, c. 135, § 4), in so far as here applicable, provides: "The business of every corporation organized under the provisions of this Chapter shall be managed by a Board of Directors." The corporation, therefore, could act only through the medium of the board of directors, as prescribed by the statutory mandate. The evidence fails to disclose that any express authority was ever given to Harriss to enter into the transaction that resulted in paying out the corporation's cash and securities. Also, the

by-laws of the corporation gave to the president general and active management of the corporation, and to the treasurer the custody of the corporate securities in question. Luton and Cruickshank, who received the securities in question, occupied respectively these offices. These two officers, knowing that the securities in question had belonged to the corporation, seeing the indorsement of Harriss on the securities transferring them to Ball, must have known or should have known, by reason of their official positions with the corporation, that Harriss had no authority from the governing body, the board of directors, to divest the corporation of these securities. Simply because it is within the power of a corporation to purchase its own stock, it does not follow by any means that an executive officer of such corporation may, by virtue of his office, exercise that power. It would seem that a discussion of the subject presented and citation of authorities is unnecessary to show that, in the absence of statutory or charter authority, a vice president of a corporate organization does not, by virtue of his office, ordinarily possess any such extraordinary authority as that of transferring the corporation's securities in a transaction that had for its objective the buying in of the corporation's own capital stock. The position, as officers and directors of the corporation, occupied by Luton and Cruickshank put them without the pale of innocent and bona fide holders of such securities in due course. The record also indicates that on April 15, 1931, when this transaction was had, the corporation owed to its creditors $733,801.23, practically twice the entire capital of the corporation. Also, at that time the corporation was under the obligation of paying off its indebtedness to the California Bank, amounting to approximately $438,704.83, and of which debt the bank desired liquidation, but had agreed to a loan of $160,000, provided the balance of the indebtedness was retired.

[4-7] Defendants Lyon and Ferguson are charged with the knowledge of their agent, Luton. In the exercise of ordinary care and diligence, Luton should have communicated the facts within his knowledge to his principals, Lyon and Ferguson, and failing in this, the principals are deemed to have such knowledge as was possessed by their agent, Luton. To hold otherwise would be to cause great inconvenience, and knowledge could be avoided in practically every case by employing agents. The rights of numerous stockholders were also involved here, as well as creditors' rights. Stockholders who invested their money in good faith had a right to rely on the reciprocal good faith of the directors and officers. Directors of a corporation are frequently spoken of as trustees. Their acts are scanned in the light of those principles which define the relationship existing between trustee and cestui que trust. Tested by these familiar principles, the directors involved had no right to take from the corporation securities with which to purchase stock that would set some of them in undisputed control of the corporation. Bowen v. Imperial Theatres, 13 Del. Ch. 120, 115 A. 918, 922.

[8, 9] Respondents' claim of ratification is answered by the statement that ratification can never be made upon the part of the corporation by the same persons who wrongfully assumed the power to make the contract. In other words, one who makes an unauthorized contract has no more right to ratify it than he had to make it. In the instant case the board of directors, approving an unauthorized act, cannot later ratify the same.

[10] The purchase by the corporation of the stock here in question, in view of the financial condition of the corporation, was certainly not made out of surplus or surplus profits, but on the contrary, the purchase in question impaired and reduced the actual corporate assets below its capital stock and debts, because the assets of the corporation at the time of the stock purchase were less than the capital stock and debts; and the stock purchase in question was manifestly prejudicial to the rights of the creditors and other stockholders. The nonsuit as to the first cause of action should not have been granted.

[11, 12] As to the second cause of action, wherein a conspiracy is charged among the defendants, we are of the opinion that the nonsuit should not have been granted as to the defendants Ball, Woodward, and Harriss, but that the court was correct in granting a nonsuit as to defendants Luton, Ferguson, and Lyon, because there is no substantial evidence in the record to make the latter named defendants joint actors in the former's alleged illegal scheme. It was the first-named group alone that was concerned in the actual purchase by the corporation of its own shares and who expected to profit thereby. There is no evidence showing any concert of action between the two

groups to accomplish the purposes of the alleged conspiracy, i. e., to place the first-named group in control of the corporation. That this was the purpose of the alleged conspiracy, or that if the purchase of the Luton-Cruickshank stock was made, such objective would have been accomplished, was never brought home to Luton, Lyon, or Ferguson. Before the last-named defendants can be held under a conspiracy allegation, the evidence must disclose not only that their actions in selling their stock and receiving corporate securities in exchange therefor was illegal, but that the conduct of Luton, Lyon, Ferguson, and Cruickshank was in furtherance of a common agreement or understanding to achieve the unlawful purpose of the directors who negotiated the stock purchase. In this respect the evidence is wholly unsatisfactory.

[13, 14] The third cause of action is directed only against defendants Ball, Harriss, Woodward, and Crowe, and seeks the return of certain salaries alleged to have been improperly and fraudulently paid by themselves as officers to themselves as individuals. (Crowe was not served.) The law seems well settled that a director or officer of a corporation is not entitled to a salary per se, and that he cannot receive a salary unless properly voted by the board of directors at a meeting at which there is a quorum present without counting his vote, and at which a majority, not counting the director affected, voted for the salary. Bassett v. Fairchild, 132 Cal. 637, 64 P. 1082, 52 L.R.A. 611; Wickersham v. Crittenden, 93 Cal. 17, 32, 28 P. 788; Id., 106 Cal. 327, 328, 39 P. 602; Graves v. Mining Co., 81 Cal. 303, 320, 22 P. 665; Lofland v. Cahall, 13 Del.Ch. 384, 118 A. 1, 3, 4, 5; Cahall v. Burbage, 14 Del.Ch. 55, 121 A. 646. In the instant case, Woodward, Harriss, Ball, and Crowe did not vote for their own salary, but separate resolutions were introduced authorizing the salary, and while not voting for the resolution authorizing his own salary, each of the last-named directors voted for the resolutions authorizing a salary for the others. Six directors were necessary to constitute a quorum, and unless, for instance, Crowe, Harriss, and Woodward were qualified to vote for Ball's salary, there was not a proper vote for that salary. Where, as in the instant case, the evidence shows that directors Ball, Crowe, Harriss, and Woodward were interested in the common object of procuring a salary for each of them, the situation is not saved by passing several separate resolutions by a majority not interested in the particular resolution adopted. Wonderful Group Mining Co. v. Rand, 111 Wash. 557, 191 P. 631, 633; 14a Cor.Jur. 143, 144, § 1908. The weight of authority seems to be that courts will not separate a resolution into parts and hold it valid on the ground that each part was carried by a majority of the votes of the other directors not interested in that particular portion, and this applies with equal force where several resolutions are introduced upon the same theory. The fact that a resolution increasing salaries is voted on in parts, so that no director votes on the proposition to increase his own salary, does not justify the passage of the salary resolution, because the effect is merely to give a semblance of legality to a wrongful act. Davids v. Davids, 135 App. Div. 206, 120 N.Y.S. 350. As to the third cause of action the nonsuit should have been denied.

[15, 16] The fourth and fifth causes of action seek to recover from Ball, Cruickshank, and Luton the alleged $2,500 secret profit hereinbefore referred to, and which is alleged to have been received and retained by Ball with the aid of Cruickshank and Luton in connection with the exchange of the Luton-Cruickshank-Ferguson-Lyon stock for the securities of the corporation. In this connection, the record indicates that Ball, after he had acquired an aggregate of 1,235 shares of the common stock from Luton and Cruickshank, for which he paid nothing, some months later sold 1,000 shares to Harriss for $2,500. In our opinion, the court below was correct in denying a nonsuit as to Ball, but granting the same as to Luton and Cruickshank. Appellant cites several cases in which a director was held liable, although he received none of the secret profit. However, in all of these cases it is to be noted that the director thus charged either participated and aided in, and had knowledge of, the making of the secret profit (Reid v. Robinson, 64 Cal.App. 46, 57, 220 P. 676), or was a member of a conspiracy in furtherance of which the transaction was made. Lomita Land and Water Co. v. Robinson, 154 Cal. 36, 45, 97 P. 10, 18 L.R.A.(N.S.) 1106. The record is barren of any evidence showing that either Luton or Cruickshank took any part in this transaction or received any part of the secret profit. Ordinarily, the only grounds upon which directors or other officers can be held liable for the acts of other officers are that (1) they participated therein, or (2) were neg-

ligent in supervising the corporate business, or (3) were negligent in the appointment of the wrongdoer. It need hardly be said that one cannot be held liable as director for wrongs of other corporate officers or agents after he has ceased to sustain the relation of director to the corporation. 3 Fletcher Cyc.Law of Private Corporations (perm.Ed.) pp. 481, 497, §§ 1069, 1082. It is not claimed that defendants Luton and Cruickshank ever made any profit out of the sale by Ball of the securities in question to Harriss or shared in any way in the illegal profit alleged to have been made. Assuming that there was fraud in the transaction, if legal wrong to the company was there done, it could only be material here as to the respondents Luton and Cruickshank if they were parties to it. Not having been participants therein, either directly or indirectly, no liability, in our opinion, can be put upon them. The action of the trial court in granting a nonsuit as to respondents Luton and Cruickshank under the fourth and fifth causes of action of the complaint was therefore correct.

[17] The question as to when a nonsuit should be granted has received the attention of the courts of this state in innumerable decisions. In weighing the action of the trial court in granting and denying a nonsuit in the instant case, we have had in mind the rule that a nonsuit should be granted only when, accepting the full force of the evidence adduced, together with every reasonable inference favorable to the plaintiff which may be drawn therefrom, and excluding all evidence in conflict therewith, it still appears that the law precludes the plaintiff from recovering a judgment under such circumstances. Mastrangelo v. West Side Union High School, 2 Cal.(2d) 540, 42 P.(2d) 634.

For the foregoing reasons, the judgment of the trial court in granting a nonsuit as to the first cause of action is reversed.

As to the second and sixth causes of action, the judgment of the trial court in granting a nonsuit as to respondents Ball, Woodward, and Harriss is reversed; and the same is affirmed as to respondents Luton, Ferguson, Lyon and Cruickshank.

As to the third cause of action, the judgment of the trial court in granting a nonsuit is reversed.

As to the fourth and fifth causes of action, the judgment of the trial court granting a nonsuit as to respondents Cruickshank and Luton is affirmed.

With reference to costs on this appeal, it appears that the same was prosecuted as to all seven respondents on one record, made up of a single reporter's transcript and one opening and closing brief. As against respondents Luton, Cruickshank, Ferguson and Lyon, appellant was not 100 per cent. successful, and therefore it is ordered that as to the parties last named each bear his respective costs of appeal.

As to respondents Ball, Woodward, and Harriss, appellant was 100 per cent. successful on this appeal, whereby, under the provisions of section 1027 of the Code of Civil Procedure, it has an absolute right to recover its costs. Estate of Prager, 167 Cal. 737, 739, 141 P. 369. However, there being seven respondents, and, as heretofore stated, only one transcript and set of briefs as to all, we are of the opinion that while appellant is entitled to its costs against the three respondents as to whom it prevailed, those costs should be, and they are, fixed and apportioned at one-seventh of appellant's costs, respectively, against each of the respondents Ball, Woodward, and Harriss.

We concur: YORK, Acting P. J.; DORAN, J.



20 Cal.App.2d 436

ANGELUS SECURITIES CORPORATION v. BALL.

Civ. S. C. 29.

District Court of Appeal, Second District, Division 1, California.

April 19, 1937.

Hearing Denied by Supreme Court June 17, 1937.

1. Appeal and error ⇐758(3)

Reviewing court was not required to investigate questions as to sufficiency of evidence where appeal was on bill of exceptions and appellant failed to point out in brief or call to attention of court particular findings claimed to have no support in evidence or particulars in which findings were not supported by evidence.

2. Corporations ⇐319(7)

Evidence *held* to justify judgment against officer and director of corporation for secret profit realized on sale of shares of common stock of corporation obtained by exchange of securities belonging to corporation on ground that officer and director acted as agent of corporation in transaction and purchased stock with funds of corporation and that receipt and retention of shares of stock which were subsequently sold, constituted a secret profit.

3. Corporations ⇐307

Directors of corporation hold fiduciary relation to stockholders by whom they have been intrusted with management of corporate property for common benefit and advantage of every stockholder.

4. Corporations ⇐307

By acceptance of office, directors in corporation preclude themselves from doing any act or engaging in any transaction in which their private interest will conflict with duty they owe to stockholders and from making use of their power or corporate property for their own advantage.

5. Corporations ⇐316(1)

Transaction between corporation and its director is not voidable, where director does not attempt to unite his personal and representative character in same transaction and where his official connection is not essential part of transaction and transaction is in good faith and free from fraud, but such transactions are subject to rigid scrutiny, and there must be full disclosure and director's actions must be open and aboveboard and taken in good faith.

6. Corporations ⇐312(5)

Director of corporation who obtained unexpected number of shares of common stock in corporation in exchange for corporation's securities had duty to inform corporation of transaction in its entirety.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Angelus Securities Corporation against Bertrand L. Ball. Judgment for plaintiff, and defendant appeals.

Affirmed.

Oliver O. Clark, of Los Angeles, for appellant.

John Perry Wood and Stanley Arndt, both of Los Angeles, for respondent.

WHITE, Justice pro tem.

We have this day filed an opinion in case No. S. C. 37 (Cal.App.) 67 P.(2d) 152, which involves questions presented in litigation out of which this appeal arises. While reference may be had to that case for a more complete statement of the facts, those involved in the appeal now before us, in brief, are as follows:

On April 15, 1931, and for several months prior thereto, respondent corporation had as its board of directors Messrs. Luton, Crowe, Woodward, Ball, Harriss, Seamans, Breslin, and Cruickshank. Of these, Luton was president, Crowe, Woodward and Harriss were vice presidents, Cruickshank was secretary-treasurer, and Harriss was general manager. For some time prior to the date last mentioned considerable dissension existed between Crowe, Woodward, Harriss, and Ball, on the one hand, and Luton and Cruickshank on the other, regarding corporate policies. From the record it appears that directors Ball, Woodward, Crowe, and Harriss were desirous of getting directors Luton and Cruickshank "out of the picture." After conferences among the first-named group, an approach was made to Luton and Cruickshank by Ball with a view to obtaining their preferred and common stock in exchange for certain trust deed securities belonging to plaintiff corporation and transferred to Ball by Harriss in his capacity as vice president of plaintiff corporation, with the understanding that if Ball obtained 470 shares of the preferred stock and 235 shares of the common stock from Luton and Cruickshank, the corporation would purchase the stock in question from Ball. It appears that, using the securities obtained from the corporation in the manner more specifically set forth in case No. S. C. 37, Ball obtained the 470 shares of preferred stock, but instead of obtaining only 235 shares of common stock, he obtained 1,235 shares, Ball thereupon delivered to the corporation the aforesaid preferred stock, but turned over to the corporation only 235 shares of the 1,235 shares of common stock. The remaining 1,000 shares Ball retained for himself, and some months later sold them to director Harriss for $2,500. This action was subsequently commenced by the corporation to recover from Ball the sum of $2,500, which it is alleged was a secret profit to him in the retention and sale by Ball of

the 1,000 shares of common stock while acting as the agent of the corporation. Upon the trial judgment was rendered against appellant, Ball, for the sum of $2,500, and from that judgment he prosecutes this appeal.

[1] Although the appeal comes to us on a bill of exceptions containing thirteen specifications of error, and appellant has not pointed out in his brief nor called to our attention the particular finding or findings claimed to have no support in the evidence and the particulars in which such finding is not supported by the evidence, and notwithstanding that it is not our duty to investigate the questions as to the sufficiency of the evidence, we have nevertheless read the record to determine in our own minds whether the findings are supported by substantial evidence. Assuming the sufficiency of appellant's brief in presenting the specifications urged in the bill of exceptions, this appeal presents, as suggested by appellant, three inquiries: (1) Was appellant acting in these transactions as the agent of plaintiff corporation? (2) Did appellant purchase these shares from Luton, Cruickshank, Lyon, and Ferguson with the funds of the corporation? (3) Was the receipt and retention of these 1,000 shares of common stock by appellant a secret profit to him as a director of plaintiff corporation?

[2] As to the first question, we are of the opinion that there is in the record substantial evidence warranting the trial court in finding that appellant was acting in these transactions as the agent of plaintiff corporation. In fact, the witness Harriss testified: "He (Ball) told us he felt that Dr. Luton and Mr. Cruickshank, with Mr. Ball's coming in there, were unnecessary expense, and that it would be better to acquire their stock to get them out of the picture, which we agreed, but, he did not think it would be possible for the company direct to make a trade with them even if they had that in mind. He felt he could do that himself." This same witness further testified: "Mr. Ball said he thought it would not be practical for the corporation to buy directly—maybe that isn't the word—that he thought there might be some feeling between Mr. Cruickshank and Dr. Luton and Mr. Woodward, Mr. Crowe, Mr. Ball and myself, that it would not be possible to work out that situation direct." Again, we have the witness Harriss detailing a conversation he had with appellant, wherein the witness testified: "During the course of these conversations Mr. Ball, asking for the list of securities, said in substance: 'I don't think it would be possible for the company directly to make this deal. I feel I could do it myself, however.'"

The record also indicates that when appellant filed his income tax return, in answering the question therein contained, "state how property was acquired," appellant wrote the words, "For cash or in payment of services rendered by myself." There was no claim made in appellant's income tax return that he had purchased certain assets from respondent corporation and resold them for a profit of $2,500. This, and other evidence which we find in the record amply supports the finding of the trial court that appellant was the agent of the corporation.

[3–5] The directors of a corporation hold a fiduciary relation to the stockholders, and have been intrusted by them with the management of the corporate property for the common benefit and advantage of each and every stockholder; and by their acceptance of this office they preclude themselves from doing any act or engaging in any transaction in which their private interest will conflict with the duty they owe to the stockholders and from making use of their power or the corporate property for their own advantage. Wickersham v. Crittenden, 93 Cal. 17, 29, 288 P. 788; Schwab v. Schwab-Wilson Machine Corp., 13 Cal. App.(2d) 1, 55 P.(2d) 1268; Kahle v. Stephens, 214 Cal. 89, 93, 4 P.(2d) 145. Where a director does not attempt to unite his personal and representative character in the same transaction, and where his official connection is not an essential part of the transaction, then the transaction between a corporation and a director is not voidable, if in good faith and free from fraud; but such transactions are subject to rigid scrutiny, and there must be a full disclosure, and the director's actions must be open and aboveboard and taken in good faith. The director must make a full disclosure of all pertinent facts or the transaction is voidable. Lomita Land & Water Co. v. Robinson, 154 Cal. 36, 45, 97 P. 10, 18 L.R.A.(N.S.) 1106; Victor Oil Co. v. Drum, 184 Cal. 226, 233, 193 P. 243; Western States Life Ins. Co. v. Lockwood, 166 Cal. 185, 135 P. 496; Id., 173 Cal. 734, 161 P. 498. The record impresses us with the fact that while directors Woodward and

Crowe knew that Ball was purchasing all of the stock of Luton, Cruickshank et al., they thought that Ball was paying cash for the 1,000 shares. The trial court evidently concluded, and he was justified in so doing, that they did not know that Ball was receiving the 1,000 shares as a profit on the transaction.

The second question, as to whether appellant purchased the 1,000 shares of common stock with the funds of the respondent corporation, is best answered with a quotation from appellant's testimony in the trial court, as follows: "As far as this 1000 shares of stock of Angelus Securities Corporation is concerned, I gave no money or property for it."

[6] With reference to the third query, we are of the opinion that the trial court was justified in finding that the receipt and retention of the 1,000 shares of common stock by appellant constituted a secret profit to him as a director of plaintiff corporation, for the reason that there is in the record substantial evidence from which the court below could conclude that the entire transaction was concealed from director Breslin, who was the owner of preferred and common stock; that it was also concealed from director Seamans, who was the holder of preferred and common stock; while it further appears that though there was a board meeting on April 15, 1931, immediately following the consummation of the transaction, the matter was not brought before the board. In our opinion, under the facts of this case, there rested upon appellant, as a director of respondent corporation, the duty to inform the corporation of this transaction; and had he done so it is apparent, in view of his own testimony that he gave neither money nor property for the stock in question, that the board of directors, stockholders, and creditors would have been apprised of the fact that the 1,000 shares of stock were purchased with securities belonging to the corporation, and could have utilized the $2,500 profit obtained from the sale thereof to liquidate in part the outstanding indebtedness of the corporation. However, with a duty upon appellant as a director to speak, he chose to remain silent.

For the foregoing reasons, the judgment appealed from should be, and it is, affirmed.

We concur: YORK, Acting P. J.; DORAN, J.

8 Cal.2d 599

Ex parte DEANE.

Cr. 3958.

Supreme Court of California.

April 16, 1937.

Courts ⇐97(5)
Habeas corpus ⇐32

Petitioner who was engaged in purchasing automobiles outside state and transporting them into state for resale, and who was arrested for violation of statute imposing $15 fee for special permit for each vehicle so brought into state, *held* entitled to writ of habeas corpus, where United States Supreme Court had affirmed holding of federal District Court that statute was unconstitutional as unwarranted burden on interstate commerce because of excessiveness of fee, since decision was binding on California Supreme Court (St.1935, p. 1453, §§ 1–3).

In Bank.

Proceeding in the matter of the application of C. J. Simpson for a writ of habeas corpus for and in behalf of Henry E. Deane.

Writ granted, with directions.

Bronson, Bronson & Slaven, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

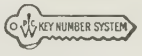
LANGDON, Justice.

This is a petition for a writ of habeas corpus. Petitioner is engaged in the business of purchasing automobiles at points outside the state, and driving or towing them into the state for resale. In 1935 the Legislature passed the "Caravan Act" (Stats.1935, c. 402, p. 1453), regulating the practice of "caravaning," defined as the transportation "from without the State of any motor vehicle operated on its own wheels, or in tow of another motor vehicle, for the purpose of selling or offering the same for sale." Section 1. The statute (sections 2, 3) required a special permit for each vehicle, and imposed a fee of $15 for such permit. Petitioner was arrested and charged with violating this statute.

While the petition was pending, a proceeding was brought by Howard Morf in the federal District Court for Southern California (14 F.Supp. 922) to restrain the state director of motor vehicles and other officers from enforcing the provisions of the statute. The court held the statute unconstitutional, and this holding was recently affirmed by the United States Supreme Court. Ingels v. Morf, 57 S.Ct. 439, 81 L.Ed. 653. The sole ground of the decision is that the fee charged for the permit is in excess of the amount reasonably necessary for providing facilities for regulation, and consequently is an unwarranted burden on interstate commerce. Since this is a federal question, the decision of the United States Supreme Court is binding on this court.

The writ is granted, and it is ordered that petitioner be discharged and his bail exonerated.

We concur: THOMPSON, J.; SHENK, J.; CURTIS, J.; EDMONDS, J.; SEAWELL, J.



8 Cal.2d 614

LEE WONG v. LEE GANG.

LEE GANG v. LEE WONG.

S. F. 15589.

Supreme Court of California.

April 22, 1937.

Partnership ⇐336(3)

In action for partnership accounting involving attack on arbitration award, evidence *held* to authorize finding that award was rendered in accordance with terms of submission, although accountants on whose report award was based merely determined whether there was bill or statement to support each entry and whether bill appeared to be genuine on its face, without investigating or ascertaining authenticity of each bill.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Lee Wong against Lee Gang, wherein defendant filed a cross-complaint. Judgment for defendant, and plaintiff appeals.

Affirmed.

Oliver Dibble, Samuel I. Jacobs, and Thomas Pierce Rogers, all of San Francisco, for appellant.

Robert Littler, and Robert W. Scott, both of San Francisco, for respondent.

LANGDON, Justice.

This is an action for a partnership accounting. Plaintiff Lee Wong and defendant Lee Gang commenced a jobbing carpenter business as partners in 1914. Defendant generally paid the bills and kept the books. In 1932 the partners employed Lee Kai Mon to work on the books, and he made a number of entries of items of expense, many of which had been incurred years before. The partners quarreled about these and other matters, and in August, 1933, the partnership was dissolved by mutual consent. There remained, however, the question of accounting and division of assets. Counting the late entries of bills made by Lee Kai Mon, it appeared that plaintiff had overdrawn his share of the partnership income, and owed defendant a considerable sum of money. Plaintiff, however, challenged the validity of the late entries of defendant's disbursements, claiming that they were unsubstantiated by evidence, and that the long delay tended to indicate their falsity. Both parties were members of the Lee Family Association of America, and in February, 1934, both voluntarily agreed to submit all the books and accounts to the said association for settlement of the controversy. They further agreed that the association might appoint four Chinese accountants to examine the books, and to pay the salaries of such accountants. The accountants were appointed, worked for 53 days, and rendered a written report, in which they found that plaintiff owed defendant the sum of $13,273.28, representing overdrawing of profits.

Plaintiff thereupon brought suit in the superior court for an accounting, to which defendant filed an answer and cross-complaint, alleging that the parties had submitted their dispute to arbitration and had agreed to be bound by the result. At the trial plaintiff took the position that there had been no binding agreement to arbitrate; that assuming that there was, plaintiff had revoked the submission; and that the award was invalid because not rendered in accordance with the terms of the submission. The trial court gave judgment for defendant, and plaintiff appealed. Conceding that there was a conflict of evidence on the first two points, plaintiff bases his appeal on the single contention that the award of the accountants was not coextensive with the submission and was therefore void.

The argument is based on the fact that the accountants, in checking over the books, and particularly the late entries, merely determined whether there was a bill or statement to support each entry, and whether the bill appeared, on its face, to be genuine. As the report states: "And he (plaintiff) asked us to be sure to check them up and find if they are true accounts or not, and to prove them with evidence * * * we investigated those accounts most carefully. If there are no bills or statements to support any accounts, we do not consider them." The report further states: "In checking up expenses we go about it the way the business people do, supporting each one with bills or statements. Checking up whether there are duplicate bills or statements, whether the name of the firm really sells the kind of merchandise listed, going over the date and accounts. * * *" Plaintiff points out that a number of the bills were not marked "Paid," and lacked receipts, and argues that there was no assurance that they had been paid. One of the accountants, testifying in this connection, stated that defendant had, at the meeting of the association, declared that he had charge of all the bills and was responsible for their payment, and that accordingly they had approved bills even though not marked "Paid." This procedure is strongly criticized by plaintiff. His contention is that to "prove them with evidence" meant that in addition to checking the book entries against bills and statements, the validity of each bill and statement should likewise have been determined by investigation, and that in failing to do this, the accountants had not made an award in conformity with the submission to arbitration.

The trial court found that the accountants had rendered a full and impartial accounting, that their report truly represented the condition of the partnership accounts, and that a further accounting was unnecessary. This finding is amply supported by the record. Plaintiff has not shown that any particular challenged item is in fact false, and defendant testified at the trial that he had paid all of the bills. There is a dispute as to exactly what were the terms of submission to arbitration, but the understanding that the accountants

had of their duties, after discussion with both partners, was in accordance with their subsequent procedure. One of them testified as to what plaintiff had requested: "He just said must have some evidence and we took the bill as evidence." The record fails to establish plaintiff's proposition that the accountants were directed to investigate and ascertain the authenticity of each separate bill. There is no question, however, as to the care with which they checked the bills against the book entries. And in this connection it may be noted from the accountants' report that plaintiff himself "wrote in a great many of expense accounts that he paid out, but we do not find any bills or statements to support them, therefore we can not consider them."

The judgment is affirmed.

We concur: EDMONDS, J.; CURTIS, J.; THOMPSON, J.; SEAWELL, J.; SHENK, J.



8 Cal.2d 611

PACIFIC CO. OF CALIFORNIA v. BOARD OF SUP'RS OF LOS ANGELES COUNTY et al.

L. A. 16138.

Supreme Court of California.

April 21, 1937.

Rehearing Denied May 20, 1937.

1. Taxation ⇐166

Amendment to statute taxing intangibles which provided that property specified in section should no longer be taxable under provisions of section if and when a net income tax should be passed or adopted in state *held* to render stocks and bonds owned by foreign corporation with principal place of business within the state no longer assessable as intangibles where net income tax law on income of individuals had been enacted and corporations had been paying tax measured by net income (Pol.Code, § 3627a, as amended by St.1935, p. 2251; St.1935, p. 1090; Const. art. 13, § 14).

2. Statutes ⇐245

In determining whether amendment to statute taxing intangibles, which provided that property specified in section should no longer be taxable under provisions of section if and when a net income tax should be passed or adopted in state, would render stocks and bonds of corporation no longer assessable as intangibles where net income tax law on income of individuals had been enacted and corporations had been paying tax measured by net income, applicable rule of interpretation was that which required plain meaning be given language employed in amendment (Pol.Code, § 3627a, as amended by St.1935, p. 2251; St.1935, p. 1090; Const. art. 13, § 14).

3. Taxation ⇐37

Amendment to statute taxing intangibles which provided that property specified in section should no longer be taxable under provisions of section if and when a net income tax should be passed or adopted in state *held* not to involve an arbitrary classification because it rendered stocks and bonds of corporation no longer assessable as intangibles on enactment of net income tax law on individuals, where corporations had been paying tax measured by net income (Pol.Code, § 3627a, as amended by St.1935, p. 2251; St.1935, p. 1090; Const. art. 13, § 14).

In Bank.

Mandamus proceeding by the Pacific Company of California against the Board of Supervisors of Los Angeles County and others.

Peremptory writ of mandate granted.

Prior opinion, 60 P.(2d) 1009.

Miller, Chevalier, Peeler & Wilson, Melvin D. Wilson, Holbrook, Taylor, Tarr & Reed, and W. Sumner Holbrook, Jr., all of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, for respondents.

SHENK, Justice.

This proceeding in mandamus was brought to test the application of the provisions of section 3627a of the Political Code.

The petitioner is a Delaware corporation with its principal place of business in the City of Los Angeles. On the first Monday of March, 1936, the assessor of the county of Los Angeles, for purposes of levying ad valorem property taxes for the tax year 1936–1937, assessed at a valuation of $443,660 the stocks and bonds in Los An-

geles county owned by the corporation. The assessment was purported to have been made pursuant to section 3627a of the Political Code. By the present proceeding, the corporation sought to have the assessment canceled.

Since 1929 (Stats.1929, p. 35), said section 3627a has contained the following provision: "Notes, debentures, shares of capital stock, bonds, deeds of trust, mortgages, and any legal or equitable interest therein, of the classes taxable to the owner thereof under the provisions of section 14 of Article XIII of the Constitution of this State, are hereby taxed upon their actual value at the rate of two-tenths of one per cent."

In 1935 the Legislature by amendment added the following: "The property aforesaid * * * shall no longer be taxable under the provisions of this section if and when a net income tax shall be passed or adopted in this State. Upon the passage or adoption of such tax and from the time such income tax becomes effective such net income tax shall be in lieu of the tax herein provided for upon notes, debentures, shares of capital stock, bonds, deeds of trust, mortgages and any legal or equitable interest therein. Provided, however, that any and all taxes imposed herein on such property prior to the passage or adoption of such net income tax and the effective date thereof shall remain fully collectible and distributable hereunder." (Stats.1935, p. 2251.)

In the same year the Legislature adopted a net income tax law (Stats.1935, p. 1090), which became effective upon its approval on June 13, 1935. It provided for the payment of a tax on the net income of individuals. That law was therefore in effect in March, 1936, when the petitioner's stocks and bonds were assessed for the payment of the tax provided by section 3627a of the Political Code.

[1-3] The enactment of the income tax law brought into operation the amendment to section 3627a of the Political Code. It is necessarily conceded that as to individuals who own intangible properties enumerated therein, the "in lieu" provision applies and no inquiry may be made as to whether in each case a tax on income derived therefrom is actually paid. It therefore must also be conceded that the substituted income tax is unlike the "in lieu" taxes involved in the cases of Southern Cal. Tel. Co. v. Los Angeles County, 212 Cal. 121, 298 P. 9, and Ingels v. Riley, 5 Cal.(2d) 154, 53 P.(2d) 939, 103 A.L.R. 1, wherein, by the express limitation of the statute, if the property was not subject to the "in lieu" tax, it remained subject to the ad valorem property tax. The respondents seek the application of the cited cases to support their position that corporation owned stocks and bonds are still locally taxable. They offer the test that "the provision is for release of notes, stocks and bonds from local taxation upon the passage or adoption of an income tax which shall be an in lieu or substitute tax thereon. The provision is for the release upon the happening of the stated event with the specified result—not for the release upon the mere happening of the stated event independent of the specified result." But when the respondents are forced to concede that the application of the test suggested by them does not as well subject an individual owner of such intangible personal property to the local ad valorem tax when that individual does not pay any income tax thereon, the foundation of its position must of necessity collapse. By the language of section 3627a the Legislature has made no differentiation between individuals and corporations, and this court may not make one for it. The language is explicit and plain, viz., that upon the passage or adoption of a net income tax such net income tax shall be in lieu of the tax provided for upon the forms of intangible property specified and any legal or equitable interest therein. No exceptions are provided for. There is no ambiguous or uncertain phrase calling for either debate or application of strict or liberal rules of interpretation. In the recent case of Northwestern Mutual Life Insurance Company v. Johnson, 63 P.(2d) 814, we again pointed out that such a provision creates a substitution and not an exemption. The applicable rule of interpretation is that which requires the plain meaning to be given to the language employed. Pacific Gas & Electric Co. v. Roberts, 168 Cal. 420, 432, 143 P. 700. There is involved no arbitrary classification by the substitution of a tax on net income as a source of revenue for ad valorem taxes on intangible personal property. The fact that corporations since 1929 have been paying a tax measured by net income, designated as a franchise or privilege tax, does not render the obvious meaning of the amended section unreasonable.

We perceive no other possible conclusion than that the forms of intangible per-

sonal property enumerated in the 1935 amendment to section 3627a of the Political Code are no longer assessable under said section and that the petitioner is entitled to a cancellation of the assessment of March, 1936, upon its stocks and bonds.

Let the peremptory writ issue as prayed.

We concur: THOMPSON, J.; EDMONDS, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.



8 Cal.2d 656

ROTH v. STATE BAR OF CALIFORNIA.

L. A. 16073, 16162.

Supreme Court of California.

April 27, 1937.

Attorney and client ⇐53(2)

Evidence disclosing that attorney for considerable period of time had been soliciting employment of himself through persons who were not entitled to practice law and had been paying those persons for solicitation *held* to authorize suspension for period of six months.

In Bank.

Petitions by Irwin H. Roth for review of recommendations of the Board of Bar Governors for his suspension from the practice of law.

Petitioner suspended for six months.

S. Ward Sullivan, of Los Angeles (Jerry Giesler and Marcus R. Brandler, both of Los Angeles, of counsel), for petitioner.

Philbrick McCoy, of Los Angeles, for respondent.

THOMPSON, Justice.

The petitioner herein was charged with a violation of rule 2 of the Rules of Professional Conduct, in that he solicited professional employment, and with a violation of rule 3, in that he employed another for the purpose of soliciting professional employment for him, which person was not at the time a member of the State Bar, and a violation of rule 9, in that he commingled the money of his clients with his own funds. An order to show cause was served on petitioner on August 23, 1935. A local administrative committee found that petitioner had violated rule 2 and rule 3 of the Rules of Professional Conduct and recommended that he be suspended from the practice of the law for a period of two years. Thereafter, the board of governors approved the findings of the local administrative committee, but recommended that petitioner be suspended for a period of six months.

On February 25, 1936, another order to show cause was served on petitioner, charging him with violation of rule 3 of Rules of Professional Conduct, and with a violation of his oath as an attorney and counselor at law, and, particularly, with a violation of subdivision 2 of section 287, Code of Civil Procedure.

The local administrative committee found that petitioner was not guilty of violating either rule 3 of Rules of Professional Conduct or subdivision 2 of section 287, Code of Civil Procedure. However, the board of governors, upon findings of its own, determined that petitioner was guilty of a violation of rule 3 and guilty of a violation of his oath and duties as an attorney and counselor at law, within the meaning of subdivision 2, section 287, Code of Civil Procedure, and recommended that he be suspended for a period of six months.

Both recommendations of the board of bar governors are now before us for consideration upon petitions whereby petitioner seeks to review the recommendations.

We shall consider the petitions together and make but one order.

At this point we shall briefly review the facts in the first charges. It appears that on June 16, 1935, Ricardo D. Reyes was injured in an automobile accident and taken to the Orange County General Hospital for treatment. Reyes resided at La Habra, at the home of his cousin, Florentina R. Castro, and her husband, Savas Castro. On or about June 20, 1935, a young man by the name of Edgar Leon, sometimes referred to in the record as Reyes and sometimes as Cortez, went to the Castro home in his automobile and, upon learning that Reyes was in the hospital and was to be released that day, drove with Mr. and Mrs. Castro to the hospital for the purpose of bringing Ricardo D. Reyes home. From this point, the stories of Reyes and the Castros and of petitioner and Edgar Leon are in conflict,

the Castros and Reyes in no unequivocal language testifying that Leon solicited Reyes to employ Roth and that, upon Reyes' consent, he (Leon) brought Roth to him a day or so later, whereupon a contract of employment on a contingency basis was signed. It was also testified that Leon introduced himself as Reyes, saying that he thought the injured man might be a relative of his. Within a few days after the contract was signed, with the consent of the injured man, a settlement was agreed upon whereby an insurance company gave petitioner a check for $750. Roth secured the check to be indorsed by Reyes and the release signed. He cashed the check, paid the injured man $100, and gave him an undated check for $275. Reyes testified that when he received the check for $275 he was told that he could not cash it, that if he needed any money either he should come into Los Angeles or telephone Roth and he would give it to him. Petitioner's testimony was to the effect that Reyes asked him to hold all but $100 for him, that he needed only $100, and did not want the rest of the money around the house. The fact remains that petitioner did not pay Reyes the sum that he had coming to him under the contract of employment until after this proceeding was commenced. His story, corroborated by Leon, is to the effect that some one telephoned him from La Habra, advising him that a friend of his had been injured and asking him to send some one to interview him. The person who is supposed to have telephoned, the petitioner said, was a former client of his, but, significantly, he could not remember his name. It also appears that Leon had served papers and done some work for Roth.

While we are inclined to believe that the board of governors has concluded in accordance with the truth of the situation, we must confess that the record would not be entirely free from doubt, were it not for the second proceeding. The second proceeding, however, and certain other facts to be mentioned subsequently, have convinced us that the petitioner has been soliciting employment in more than the one case.

In the second case, one Frank Mays was injured in an automobile accident during the month of October, 1934, and was thereafter confined as a patient in the General Hospital in Los Angeles. While so confined, George Garrett, an unlicensed person, interviewed Mays and solicited him to employ the petitioner herein to prosecute or compromise his claim for personal injury. As a result of the solicitation, petitioner was employed and secured a settlement for $500 and, in accordance with his contract, reserved to himself therefrom the sum of $166.66 as compensation for his services. Garrett and his partner Evans testified that they received one-half of the sum so retained by Roth, that they had been in the business of soliciting employment on behalf of attorneys in personal injury cases, and had solicited employment on behalf of Roth. In fact, they testified that they had been employed by an adjustment agency for the purpose of soliciting and investigating. It also appears from the records in the two cases that petitioner was admitted to practice from the state of Missouri in January, 1931; that very shortly after his arrival he met a man who was running an adjustment agency; that he went to work for the adjustment company, after having looked into the cases of persons who had been suspended for soliciting business through an adjustment company. Petitioner challenged Garrett and Evans to prove cases other than the Mays case in which they had solicited employment of himself, but when Garrett was called for the purpose of so testifying, petitioner successfully objected to the introduction of such evidence upon the ground that it was without the issues and an attempt to prove matters foreign to the record. The further fact should be mentioned that petitioner's conduct in other cases has been the subject of investigation and that he has been employed in other cases under suspicious circumstances.

We entertain no doubt that petitioner has been soliciting the employment of himself through persons who are not entitled to practice law and has been paying those persons for this solicitation, and, from all the circumstances, we are convinced that his conduct has extended over a considerable period of time and that for this reason the recommendation of the board of governors is not an unreasonable period of suspension.

It is, therefore, ordered that petitioner be suspended for a period of six months, said period of suspension to commence thirty days after the filing of this order.

We concur: EDMONDS, J.; SHENK, J; CURTIS, J; LANGDON, J; SEAWELL, J.

FLEURY v. RAMACCIOTTI et ux.

S. F. 15676.

Supreme Court of California.

April 29, 1937.

Rehearing Denied May 27, 1937.

1. Mortgages ⇐86(3)

Evidence that mortgagor signed and predated a waiver of statute of limitations on note, for benefit of friend who was executor of mortgagee's estate, coupled with testimony of disinterested party that mortgagor had made a new note and mortgage and that there was not to be a deficiency judgment, *held* to sustain finding of agreement that there should be no deficiency judgment where foreclosure was brought by subsequently appointed administratrix.

2. Evidence ⇐434(7)

Parol evidence of understanding that no deficiency judgment was to be taken against mortgagor on renewal note and mortgage *held* admissible in foreclosure proceedings, since fraud could always be shown, notwithstanding the written instruments superseded prior negotiations.

3. Mortgages ⇐86(2)

Evidence of fraudulent omission of agreement against deficiency judgment in renewal note and mortgage *held* admissible as against contention mortgagor was careless in not reading note and, as an experienced businessman, was not entitled to rely on mortgagee's representations, since fraud is a defense, even in absence of fiduciary or confidential relations.

In Bank.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action to foreclose a mortgage by Leonide Fleury, administratrix of the estate of Leonide G. Auzerais, deceased, against H. F. Ramacciotti and his wife. From judgment denying deficiency judgment following decree of foreclosure, plaintiff appeals.

Affirmed.

P. A. Bergerot and A. P. Dessouslavy, both of San Francisco, for appellant.

Byrne, Lamson & Jordan, of San Francisco, and John W. Skinner, of Berkeley, for respondents.

LANGDON, Justice.

This action was brought to foreclose a mortgage. The court rendered a decree of foreclosure, but denied a deficiency judgment, and plaintiff appealed.

On October 1, 1925, defendants executed a note and mortgage to Leonide C. Auzerais, in the sum of $6,000, payable in two years. The payee died in 1930, and Norbert C. Babin, the executor of the payee's estate, inadvertently failed to enforce the obligation, with the result that the statute of limitations ran against it on October 1, 1931. Babin was an intimate friend and business associate of defendant Ramacciotti, and took the matter up with him, explaining the difficult situation in which he (Babin) was placed. Ramacciotti states that at this time he agreed to help Babin, offering to deed the property to the estate, or to permit foreclosure, provided that no deficiency judgment should be had against him. Thereupon, at Babin's request, Ramacciotti signed a document on October 10, 1931, predated as of September 15, 1931, in which he waived the defense of the statute of limitations in consideration of Babin's promise not to bring action on the note before April 1, 1932. After this period had elapsed, and on June 15, 1932, Ramacciotti executed a thirty-day renewal note and mortgage predated as of April 1, 1932, and received a surrender of the old note.

The present action on the new note was commenced on April 26, 1933. Ramacciotti defaulted. In October, 1933, Babin died, and plaintiff Fleury was substituted as administratrix with the will annexed. After Babin's death, irregularities on his part were discovered. Ramacciotti then investigated, found that a decree of foreclosure and a deficiency judgment had been entered, and proceeded to have the default set aside and answer filed. The answer alleged that the understanding of the parties was that the new note should be so drawn as to prevent any deficiency judgment against the mortgagor, and that, in reliance upon Babin's representation that it was so drawn, Ramacciotti had signed it without reading it. The trial court so found, and concluded that a deficiency judgment was not proper.

[1] Although the evidence in support of these findings is largely the testimony of defendant Ramacciotti as to conversations between himself and Babin, it was sufficient, if believed by the trial court, to

sustain the judgment. Moreover, the circumstances tend to establish defendant's version of the transaction. The statute of limitations had run on the original note, and there is no suggestion that it had been tolled for any reason. Notwithstanding the outlawry of the note, however, we find Ramacciotti signing a waiver, and permitting it to be predated for Babin's protection; and we also find Ramacciotti signing a renewal note. This was done, it appears, because of their many years of friendship, and it is quite reasonable to suppose, as Ramacciotti testifies, that he intended to safeguard himself against personal liability. In addition, there is the corroborative evidence of the witness W. H. Manaton, who testified to conversations with Babin, in which Babin stated that he had allowed the Ramacciotti mortgage to become outlawed and that he was very much worried about it. The witness testified: "I said 'You don't have to be disturbed about Ramie. Ramie will straighten the thing out. You need not worry. We are all friends.' He says, 'I am Ramie's friend. I hope he does this for me. If he does, I will not take a deficiency against him.' I said, 'I know he will do it.'" Manaton further testified that about six months later he had another conversation with Babin in which the latter said: "Ramie was perfectly wonderful about it. He executed a new mortgage and a new note, and it has all been arranged, so far as Ramie is concerned, there will be no deficiency judgment against him."

[2] Plaintiff's contention that the evidence was admitted in violation of the parol evidence rule is of course untenable, for, although a written instrument may supersede prior negotiations and understandings leading up to it, fraud may always be shown to defeat the effect of an agreement.

[3] Plaintiff further contends that, assuming the fraud of Babin, defendant cannot set it up because of his carelessness in failing to read the renewal note, and that Ramacciotti was an experienced businessman, not entitled to rely upon any representations of Babin. Plaintiff in this connection conceives the rule to be that only where confidential relations exist between the parties is one who negligently fails to read an instrument entitled to void it for fraud. Such is not, however, the view adopted by this court. In California Trust Co. v. Cohn, 214 Cal. 619, 7 P.(2d) 297, we declared that, where failure to read an instrument is induced by fraud of the other party, the fraud is a defense even in the absence of fiduciary or confidential relations.

The judgment is affirmed.

We concur: CURTIS, J.; SEAWELL, J.; SHENK, J.; THOMPSON, J.



8 Cal.2d 617

DOS PUEBLOS RANCH & IMPROVEMENT CO. v. ELLIS et al.

L. A. 16074.

Supreme Court of California.

April 26, 1937.

1. Appeal and error ⇐801(1)

Order giving respondent time in which to file brief and placing cause on its merits on "ready to submit" calendar *held* to deny respondent's motion to dismiss appeal or affirm, made on grounds that appeal was taken for delay only and that questions were too insubstantial to need further argument, and to submit case for decision on its merits on briefs of parties (Rules of the Supreme Court, rule 5, § 3).

2. Pleading ⇐362(1)

In lessor corporation's action to ancel lease for violation of its terms, allegations that alleged acts of violation were done with consent of named person who owned more than majority of shares of stock of lessor corporation, and controlled, dominated, and managed corporation and all of its shares *held* properly stricken from answer because inadequate to show that corporation and named person were one and same entity and that one was alter ego of the other.

3. Corporations ⇐1

To cast aside legal fiction of corporate entity distinct from entity of those who own capital stock of corporation, it is not enough that all capital stock of corporation is controlled by one or more persons, or that corporation is so organized and controlled and its affairs so managed as to make it merely

instrumentality, conduit, or adjunct of its stockholders, but it must further appear that they are business conduits and alter ego of one another, and that to recognize their separate entities would aid consummation of a wrong.

4. Pleading ⇐236(1)

Amendment of pleadings is within sound discretion of trial court.

5. Appeal and error ⇐959(1)

Exercise of trial court's discretion in refusing or allowing amendment of pleadings will not be disturbed unless record shows manifest or gross abuse of discretion.

6. Pleading ⇐236(2)

In lessor corporation's action to cancel lease for violation of its terms, refusing to allow proposed amendment to answer, offered to establish that person who consented to alleged acts of violation and lessor corporation were one and same entity, *held* not abuse of discretion, where defendants had filed two previous answers and two amended answers and there was ground for inference that belated allegation in proposed amendment was made only for purpose of getting into court.

7. Pleading ⇐349

Where none of answers or amended answers filed by defendants contained any denial of allegations of second cause of action set out in complaint, plaintiff was entitled to judgment on pleadings as to that cause of action.

8. Judgment ⇐589(1)

In actions to cancel lease and to quiet title to leased property, in which defendants' only claim to leased property arose out of lease, judgment canceling lease was conclusive of any defense to action to quiet title, since both actions sought same relief in different forms.

In Bank.

Appeal from Superior Court, Santa Barbara County; Atwell Westwick, Judge.

Action by the Dos Pueblos Ranch & Improvement Company against Rollo Ellis and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

M. H. Peterson, of San Francisco, and P. Talbot Hannigan, of Los Angeles, for appellants.

Heaney, Price, Postel & Parma and Clarence A. Rogers, both of Santa Barbara, for respondent.

CURTIS, Justice.

[1] The respondent in this action under section 3 of rule V of this court moved for a dismissal of the appeal or an affirmance of the judgment on the grounds that the appeal was taken for delay only; that the questions on which the decision of the case depends are so unsubstantial as not to need further argument; and that the appellants have failed to comply with the rules of court. Upon the argument of this motion, the respondent (its brief in answer to appellant's opening brief not having been filed) was given time in which to file said brief, and an order was made placing the cause on its merits on the ready to submit calendar. This order disposes of the respondent's motion to dismiss or affirm, and its legal effect is to deny said motion and to submit the case for decision on its merits upon the briefs of the parties filed herein.

The complaint in this action contains two causes of action. By the first cause of action, the plaintiff seeks to set aside and cancel a lease of certain real property described therein on the ground that the defendants have violated the terms thereof and have thereby forfeited all their rights thereunder. The second cause of action is the ordinary action to quiet title to real property, being the same real property described in said lease. Rollo Ellis and Murl A. Ellis filed an answer to said complaint to which the court sustained a demurrer interposed by the plaintiff. These defendants then filed an amended answer, and on the same day the defendant, the Advance Petroleum, Limited, filed its answer. Demurrers to these answers and motions to strike out portions of each of said answers were filed by the plaintiff, but before any hearing was had on these demurrers or motions, by leave of court, the defendants filed a consolidated amended answer to the complaint. Thereupon, plaintiff, after due notice to defendants, moved to strike from this amended answer certain portions thereof. This motion was granted on March 19, 1936, and notice of said ruling was given to the defendants on March 21, 1936. On April 24, plaintiff served notice of motion for judgment on the pleadings. Before said motion was heard and on May 11, 1936, P. Talbot Hannigan, attorney for defendants,

filed a complaint in intervention on his own behalf, but failed to serve said complaint on plaintiff. The record does not disclose that any action has been taken in reference to this complaint in intervention, except that the court granted leave to file the same. No further reference need be made to this pleading. On June 2, 1936, and before plaintiff's motion for judgment on the pleadings was heard, the defendants served and filed a notice for leave to file a further amended answer. These two motions, that is, plaintiff's motion for judgment on the pleadings, and defendants' motion for leave to file a further amended answer, came on for hearing and were heard together. The court denied the motion of defendants for leave to file said amended answer, and granted plaintiff's motion for judgment on the pleadings. From the judgment in favor of the plaintiff following the action of the court upon said motions, the defendants have appealed.

[2, 3] As noted above, plaintiff seeks in the first cause of action of its complaint to terminate and cancel a lease of certain real property, executed by it in favor of the defendant Rollo Ellis, and by him assigned in part to the other defendants. The grounds upon which the plaintiff asked that said lease be terminated and canceled were that the defendants had violated the terms of the lease in a number of material respects and on various and diverse occasions. In their several amended answers filed herein, the defendants, while not expressly admitting said acts of violation, allege that whatever acts were done or performed by them after the execution of said lease and while they were operating thereunder, were done and performed in conjunction with and by the express consent and with the active cooperation of Herbert G. Wylie, and "that at all times therein mentioned the plaintiff and one Herbert G. Wylie were, and now are, one and the same; that at all of the times in said complaint mentioned, said Herbert G. Wylie was and now is, the owner and in possession of more than a majority of the issued and outstanding shares of the capital stock of plaintiff Dos Pueblos Ranch & Improvement Company, a corporation, and the holder of, and did retain absolute control, domination, and management of all of the shares thereof, and of said corporation." This and other similar allegations in the amended answers filed by the appellants were struck out by the court on motion of the respondent on the ground that the same were irrelevant, immaterial, and surplusage. They furnish practically the only justification of the appellants for the commission of the acts which respondent contends breached the terms of the lease. The only theory under which these allegations could become material and therefore afford a legal defense to respondent's claim that the appellants had breached the terms of the lease, is that they show that the respondent and Herbert G. Wylie were one and the same entity and that one is the alter ego of the other. That these allegations are woefully inadequate for that purpose is apparent when given only a casual observation. It is simply stated in these allegations that Herbert G. Wylie owns more than a majority of the capital stock of said corporation and that he controls, dominates, and manages said corporation and all of its shares. This statement is not a sufficient allegation that the two entities are one and the same person. Erkenbrecher v. Grant, 187 Cal. 7, 200 P. 641, 642. In that case this court held as follows: "In order to cast aside the legal fiction of distinct corporate existence as distinguished from those who own its capital stock, it is not enough that it is so organized and controlled and its affairs so managed as to make it 'merely an instrumentality, conduit or adjunct' of its stockholders, but it must further appear that they are the 'business conduits and alter ego of one another,' and that to recognize their separate entities would aid the consummation of a wrong. Divested of the essentials which we have enumerated, the mere circumstance that all the capital stock of a corporation is owned or controlled by one or more persons, does not, and should not, destroy its separate existence; were it otherwise, few private corporations could preserve their distinct identity, which would mean the complete destruction of the primary object of their organization." See, also, Minifie v. Rowley, 187 Cal. 481, 487, 202 P. 673; Hollywood Cleaning & Pressing Co. v. Hollywood Laundry Service, Inc., 217 Cal. 124, 129, 17 P.(2d) 709. There was no error, therefore, in the action of the court in striking out from the several amended answers filed by the appellants, the allegations respecting the relationship existing between the respondent and Herbert G. Wylie.

[4-6] In the proposed amended answer of the appellants, they attempted to remedy

this defect in their former answers by alleging upon information and belief that Herbert G. Wylie owned all of the issued capital stock of said respondent except one share issued to each of the directors for the purpose of qualifying them to legally act as directors, and that in legal effect the respondent was the alter ego of the said Herbert G. Wylie. The trial court denied the motion of appellants to file this amended answer. No rule is more firmly established in this state than that which holds that the amendment of pleadings is within the sound discretion of the trial court. Tolbard v. Cline, 180 Cal. 240, 180 P. 610; College National Bank v. Morrison, 100 Cal.App. 403, 280 P. 218. Where such discretion has been exercised by a trial court, a reviewing court will not disturb its action unless the record shows a manifest or gross abuse of discretion. Fetterley v. Gibson, 210 Cal. 282, 291 P. 411; 21 Cal.Jur. 181, 182. There is no showing on this appeal that the trial court abused its discretion in the present instance. The appellants between them had filed two previous answers and two amended answers, in all of which they alleged simply the ownership of more than a majority of the capital stock of respondent by Herbert G. Wylie. These allegations were made upon information and belief. The trial court may well have inferred that if the appellants had any reliable information as to the ownership of the stock of respondent by Wylie, they had this information at the time of the filing of their original answers, and that if they then believed that he only owned more than a majority of the said stock, their subsequent and belated allegation in their proposed amended answer that he owned practically all of said stock was not made in good faith and probably only for the purpose of getting into court and without any reasonable probability that the same could be supported by competent proof. If the trial court was of that view, and we think it may well have been, the record before us fails to show any abuse of discretion by it in the denial of appellants' motion to file their proposed answer in so far as said proposed amended answer applied to the first cause of action of the complaint in said action.

[7,8] None of the answers or amended answers filed by the appellants contained any denial of the allegations of the second cause of action set out in said complaint. This cause of action as we have seen was an action to quiet title to the same real property described in the lease referred to in the first cause of action. Plaintiff was therefore entitled to a judgment on the pleadings as to that cause of action (Leffingwell v. Griffing, 31 Cal. 231) unless the court erroneously denied appellants leave to file their proposed amended answer in which they denied all the allegations of the second cause of action. It is apparent from the whole record in this case that the two causes of action in the complaint not only concern the same property but, in effect, they, in different and separate forms, seek the same relief. In the first cause of action, respondent asks to have canceled a lease of said real property, and in the second cause of action, it asks that its title to said real property be quieted. The only claim to said real property made by any of the appellants arose out of their alleged rights under the lease. Therefore, if appellants failed in their defense to the first cause of action and the lease was ordered canceled, appellants' claim to any interest in said property was thereby terminated. On the other hand, if respondent prevailed in its action to quiet title, then appellants' claims under the lease were of no validity. Therefore, when the trial court denied appellants' motion to file their proposed amended answer to the first cause of action, the respondent was entitled to judgment canceling the lease—which was in effect a judgment quieting its title to said real property. It would avail the appellants nothing after a judgment canceling their lease to thereafter litigate the quiet title action, as it had already been determined in the first cause of action that their only claim or interest in the real property—that acquired under the lease—had ceased and was of no further validity. There was, therefore, no abuse of discretion in the court's denial of appellants' motion to file their proposed amended answer in so far as said proposed answer related to the second cause of action of said complaint.

For the reasons given herein, the judgment is affirmed.

We concur: SHENK, J.; EDMONDS, J.; THOMPSON, J.; LANGDON, J.; SEAWELL, J.

8 Cal.2d 639

CITY OF OAKLAND v. BROCK.

S. F. 15555.

Supreme Court of California.

April 27, 1937.

1. Evidence ⇐32

Supreme Court will not take judicial notice of municipal ordinances in proceeding originating in Superior Court.

2. Municipal corporations ⇐57

Generally, municipal corporation may not exercise its governmental functions beyond its corporate boundaries (Const. art. 11, § 11).

3. Licenses ⇐6(2)

Municipality may enforce compliance with its standards by persons selling within its confines perishable food commodities produced beyond its boundaries, by requiring permit or license to sell, and by issuing such permit or license only to those who meet prescribed standards and regulations, including, if reasonable, opportunity for inspection of outlying production plants or establishments.

4. Injunction ⇐118(2)

City's complaint to restrain state director of agriculture from withdrawing approval of municipal inspection of slaughterhouses, alleging that under ordinance providing for inspection of slaughterhouses, outlying slaughterhouses serving city were inspected, and failing to allege that state inspection was insufficient protection to city consumers *held* not to state cause of action, as failing to allege city's authority for, or necessity or indispensability of, city's inspection beyond city's corporate boundaries (St.1931, p. 567; St.1933, p. 60; p. 109, §§ 302, 303, 305; Const. art. 11, § 11).

5. Injunction ⇐75

City's suit to restrain state director of agriculture from withdrawing approval of municipal inspection of slaughterhouses serving city from without its corporate boundaries *held* appropriate remedy, as suit against state officer to compel performance of duty enjoined on him by law (Code Civ.Proc. § 1085, as amended by St.1935, p. 386).

In Bank.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Suit by the City of Oakland against A. A. Brock, state director of agriculture. Decree for plaintiff, and defendant appeals.

Reversed.

Prior opinion, 60 P.(2d) 522.

U. S. Webb, Atty. Gen., and Siebert L. Sefton, Deputy Atty. Gen., for appellant.

F. B. Fernhoff and Homer W. Buckley, both of Oakland (Decoto & St. Sure and Stanley R. Sterne, all of Oakland, of counsel), for respondent.

SHENK, Justice.

The City of Oakland filed a complaint in the superior court asking for declaratory relief and an injunction to restrain the defendant, as director of agriculture, from withdrawing his approval of municipal inspection of slaughterhouses maintained outside the city's boundaries but from which meat products are furnished to the inhabitants of the city. The defendant's general demurrer to the complaint was overruled. He declined to answer and the court entered judgment declaring the extraterritorial inspection by the plaintiff of the slaughterhouses involved to be authorized and valid and decreeing that the defendant Brock continue his approval of such municipal inspection. The defendant appealed from the judgment.

The complaint alleges the maintenance of a meat inspection department by the city; the existence of four slaughterhouses in contiguous incorporated territory in which meat inspection departments are not maintained and from which 80 per cent. of the meat from the animals slaughtered is sold within the corporate limits of the City of Oakland; the adoption in 1928 of Ordinance 4123 new series, re-enacted in 1932 as part of the Municipal Code of Oakland, providing for inspection of slaughterhouses, and the continued inspection service thereunder of such outlying slaughterhouses; the enactment of state legislation (Stats.1931, p. 567; Stats.1933, p. 60), providing for state inspection of slaughterhouses and approval by the director of agriculture of municipal inspection thereof; the previous approval pursuant thereto of the plaintiff's inspection of such outly-

ing slaughterhouses; and the threatened withdrawal by said director of his approval of the municipal inspection of such outlying slaughterhouses on the ground of alleged lack of authority to approve municipal inspection of slaughterhouses outside the limits of the municipality.

The only allegation in the complaint respecting the provisions of Ordinance No. 4123, new series, is the following: "That in and by the terms of said ordinance, and in section 55 thereof, it is provided for the inspection of meats at slaughterhouses lying outside the corporate boundaries of the said City of Oakland when meats therefrom are sold within said City of Oakland."

[1] This court will not take judicial notice of municipal ordinances in a proceeding originating in the Superior Court. Marysville Woolen Mills v. Smith, 178 Cal. 786, 791, 175 P. 13; 10 Cal.Jur. p. 705. The allegation therefore limits the question to whether and under what circumstances, if at all, a municipality has power to prescribe extraterritorially the standards of sanitation and purity maintained by slaughterhouses which sell their products within the municipality.

[2, 3] A municipal corporation has generally no extraterritorial powers of regulation. It may not exercise its governmental functions beyond its corporate boundaries. Const. art. 11, § 11; Von Schmidt v. Widber, 105 Cal. 151, 38 P. 682; Mulville v. City of San Diego, 183 Cal. 734, 192 P. 702; 4 McQuillin on Corporations, § 1434; 18 Cal.Jur. p. 803. To this rule there are some well-recognized exceptions, but the allegations of the complaint do not bring the case stated by the plaintiff within any of them. It is assumed that the city has authority to provide for inspection of meat sold within the city and of slaughterhouses situate within its limits. The facts alleged, however, do not make out a case where extraterritorial exercise of its function of regulation and inspection is indispensable or even necessary to the performance of its duty or concern in safeguarding the health of its citizens. The law recognizes that a municipality may enforce compliance with its standards by persons selling within its confines perishable food commodities which have been produced beyond its boundaries by requiring a permit or license to sell within the city and issuing such permit or license only to those who meet the prescribed standards and regulations, including, if not unreasonable, opportunity for inspection of the outlying production plants or establishments. In re Blois, 179 Cal. 291, 176 P. 449; 18 Cal. Jur. p. 804; Korth v. City of Portland, 123 Or. 180, 261 P. 895, 58 A.L.R. 665; Sterett & Oberle Packing Co. v. City of Portland, 79 Or. 260, 154 P. 410; State v. Nelson, 66 Minn. 166, 68 N.W. 1066, 34 L.R.A. 318, 61 Am.St.Rep. 399. The plaintiff here, however, has not alleged any authorized regulatory power. By its allegations it bespeaks the exercise of the bare unauthorized power of regulation and inspection beyond its territorial limits. The plaintiff relies on In re Blois, supra, and Ebrite v. Crawford, 215 Cal. 724, 12 P.(2d) 937, in support of its argument that the right of inspection of the outlying slaughterhouses is indispensable to its governmental function of safeguarding the health of its citizens. The case of In re Blois is not inconsistent with the conclusion herein. It was there assumed that the city had the power to require inspection of laundries situate in another city as a condition precedent to granting a license to supply laundry services to inhabitants of the city. The court there was concerned with the question whether the rates charged for inspection of outside laundries operated by the applicant for the license were unreasonable and discriminatory. The case of Ebrite v. Crawford involved a municipal airport lying partly within and partly without the city limits and which the municipality had express legislative permission to acquire and govern. Stats.1927, p. 485.

The authorities do not recognize extraterritorial regulation and inspection in itself as either necessary or indispensable to a government function in such cases. The decisions point to the obvious method of enforcing compliance with appropriate standards, viz., inspection at the city limits or, where that is inadequate, the requirement for a permit or license, and compliance with prescribed regulations as a condition precedent to the issue thereof.

[4] On the record here presented the lack of the factor of either necessity or indispensability is further shown by the application of the provisions of the Agricultural Code. That code makes compulsory federal, state, or municipal inspection of all establishments in the state operated for

the purpose of slaughtering animals. Stats. 1933, p. 60. The sale of meat for food purposes within the state is prohibited unless it bears the "inspected and passed" stamp of either the federal, state, or municipal inspection departments. Section 305. Recognition is extended to municipal inspection departments existing or to be inaugurated. Section 302. Upon the approval by the director of agriculture of an establishment operating under municipal inspection there may be added to the stamp in use in said establishment the words "Cal. approved," and such stamp is accorded the same recognition as "Cal. inspected and passed." Section 303. The act provides for a comprehensive program of inspection and regulation of slaughterhouses outside the jurisdiction of any established municipal inspection department. It is not alleged nor contended that such state regulation and inspection is insufficient protection to the health and welfare of the inhabitants of the City of Oakland. Recognition of existing or future municipal inspection departments does not therefore necessarily include nor compel approval of inspection service performed by municipalities outside their territorial boundaries, even though such service presupposes requirements for standards equal to those prescribed by the Agricultural Code. If it did, the activities of the municipality would be resolved into a race to claim fees for inspection from every establishment outside of the city otherwise subject to inspection under the Agricultural Code which supplied any portion of its meat or meat products to inhabitants of the city.

[5] The present action is appropriate as an action against an officer of the state to compel performance of a duty enjoined upon him by law. Section 1085, Code Civ. Proc. (as amended by St.1935, p. 386); Nougues v. Douglass, 7 Cal. 65; U'ren v. State Board of Control, 31 Cal.App. 6, 12, 159 P. 615; 59 C.J. p. 312.

It follows, however, from the foregoing discussion, that the complaint does not state a cause of action and the demurrer should have been sustained.

The judgment is reversed.

We concur: LANGDON, J.; SEAWELL, J.; EDMONDS, J.; THOMPSON, J.; CURTIS, J.

8 Cal.2d 641

PEOPLE v. McNEILL.

Cr. 4082.

Supreme Court of California.

April 27, 1937.

Homicide ⇐244(1)

Circumstantial evidence of accused's guilt of murder, contradicted only by accused's testimony claiming self-defense, which conflicted with accused's statements before trial that he believed prowler killed deceased, *held* to sustain conviction.

In Bank.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

John D. McNeill was convicted of murder in the first degree. On appeal under the "automatic appeal" statute.

Affirmed.

Russell S. Waite and John Neblett, both of Riverside, for appellant.

U. S. Webb, Atty. Gen., Warner I. Praul, Deputy Atty. Gen., and Earl Redwine, Dist. Atty. Riverside County, of Riverside, for the People.

SEAWELL, Justice.

In an indictment returned by the grand jury of Riverside county, the defendant was charged with the murder of his wife, committed on August 13, 1936. At the conclusion of the trial, the jury brought in a verdict of murder of the first degree without recommendation, and sentence imposing the extreme penalty was pronounced. While ably and vigorously represented by counsel upon the trial, no appeal has been noticed by the defendant. The cause comes before us under the provisions of the commonly designated "automatic appeal" statute. Pen.Code, § 1239 (as amended by St. 1935, p. 1868).

It appears that at the time of the homicide the defendant and deceased had been married approximately twenty-five years. There were four children of the union aged, respectively, 13, 15, 17, and 19 years. Deceased was 49 years of age and defendant was 52. On the day upon which deceased met her death the parties were living in the town

of Temecula, where the defendant was engaged as a blacksmith and deputy constable. The evidence is undisputed that some time between 12 and 1 o'clock on the afternoon of August 13, 1936, the deceased was the victim of a brutal beating about the head and body that caused her demise several hours later. The autopsy surgeon testified that his examination disclosed five ragged lacerations, varying in length from three to four inches, on the head of deceased, some of which made visible the skull bone. She also bore a bluish spot in the pit of her stomach under which the crackling of broken bones was discernible. The cause of death was described as shock resulting from the skull and abdominal injuries.

By means of the testimony of several disinterested witnesses the prosecution placed defendant at the scene of the assault at or about the time of its commission. Three neighbors testified that they saw the defendant in the immediate vicinity of his home and approaching the same a few minutes prior to 12 o'clock on the day of the homicide. One of these witnesses described defendant as wearing overalls, which were subsequently found to be spattered with blood. Another distinterested witness testified that he heard a woman's screams emanating from defendant's home at approximately 12:15 on the day in question. He described them as continuing for a period of three or four minutes. A young high school boy for whom defendant had been making a hunting knife at his blacksmith shop, not finding defendant at the shop, approached defendant's home to inquire about the completion of the knife. As he neared the house shortly after 12 o'clock the witness could see the defendant pacing back and forth in the living room. Upon discovering the presence of the witness outside the house the defendant went out and discussed the knife with the boy, who then left.

The seventeen year old son of deceased and defendant testified that on the day of the homicide he came home to his lunch between 1 and 2 o'clock; that he was met outside the house by his father, who told him "somebody had beaten up my mother"; that he rushed into the kitchen and found his mother lying on the floor, bloody and apparently unconscious; that he attempted to assist his mother; that blood was scattered about, some of which had been wiped up; that he noticed a drop of blood on his father's eyeglasses; that defendant said it must have been a prowler, adding, "Come here and look," whereupon the witness entered a bedroom and noticed the drawers of a dresser pulled out and a trunk open; that a lady's purse lying there still retained its contents of money; that a gun which he noticed on the dining room table as he first entered the house with defendant had disappeared after the witness threatened to kill the person responsible for his mother's condition and was later found under a scarf on a dresser; and that he (the witness) went to summon medical and police aid.

The doctor who responded to the summons for aid testified that he found the deceased lying on the floor in the kitchen and attempted to aid her. He then related the substance of a conversation had with defendant between 1:40 and 2:10 p. m. in which the latter charged the assault to a prowler, pointing out, in substantiation thereof, the open dresser drawers and the open trunk. On at least three other occasions shortly after 1 o'clock on the day of the homicide, the defendant repeated the prowler story to as many disinterested witnesses.

A deputy sheriff who arrived on the scene at about 3:30 in the afternoon disclosed that two blood-stained house aprons were found in the cow barn and a bloody rag discovered under a rabbit hutch. The witness also testified that further search uncovered two hard rubber rollers from a clothes wringer, one of which had blood on it. They were found in a covered wood box in a corner of the porch. When the witness informed defendant that he would have to take him to jail defendant made no reply. Before leaving, the defendant removed a loaded revolver from a dresser drawer, stepped back and started to turn when the witness took the gun from him.

Six days after the homicide the defendant for the first time advanced an entirely different explanation for the assault and resulting homicide. This new version was thereafter related by defendant on several occasions to peace officers and was the story told by him when on the witness stand in his own defense. In short, defendant narrated that when he came home to lunch shortly after 12 o'clock on the day of the homicide the deceased upbraided him for not having sufficient money with which to pay the premium on a small life insurance policy; that she addressed a vile epithet to

him and pointed a gun at him which she held in her left hand; that she threatened to kill him; that fearing injury to his person he picked up a hard rubber roller from a clothes wringer and threw it at the deceased, striking her on the side of the head; that he threw a second and similar roller at deceased and struck her in the stomach; that she then dropped the gun which he kicked aside; that he again picked up one of the rollers and struck deceased over the head; that everything then "went blank"; that when he recovered his bearings he was standing outside of the house; that he came in and held deceased in his arms; that he threw the rollers into the wood box on the porch, picked up and wiped off the gun and wiped up some of the blood on the floor. The defendant was the sole witness for the defense.

There was medical testimony to the effect that deceased's left hand, the hand in which defendant said she held the gun, had been crippled for several years. The nineteen year old daughter of the parties testified that deceased's left hand had been operated upon and for four years had been crippled in such a manner as to preclude her from picking up or gripping an object with the left hand.

The foregoing is a fair summarization of the evidence. We have read the entire transcript of the proceedings in the court below, and have examined the rulings and instructions of the trial court. We have found nothing that even approximates prejudicial error. The jury was fully and correctly instructed on all pertinent matters, including self-defense. It was given five forms of verdict and instructed on each. In view of defendant's conflicting stories descriptive of events culminating in the death of deceased, and particularly in the light of glaring weaknesses and discrepancies in his self-defense theory, we are satisfied that the jury, under the evidence, acted well within its province when it impliedly found that the death of deceased was willful, deliberate, and premeditated so as to constitute murder of the first degree, warranting, in the discretion of the jury, the imposition of the extreme penalty.

Judgment affirmed.

We concur: CURTIS, J.; EDMONDS, J.; SHENK, J.; THOMPSON, J.; LANGDON, J.

CRAWFORD v. BOARD OF EDUCATION OF CITY OF GLENDALE et al.

Civ. 11297.

District Court of Appeal, Second District, Division 2, California.

April 16, 1937.

Rehearing Denied May 7, 1937.

Hearing Denied by Supreme Court June 14, 1937.

1. Schools and school districts ⇐133

Junior college teacher, not named in list of probationary teachers discharged by city board of education at meeting held before expiration of third consecutive year of his employment in position requiring certification qualifications, nor notified within such time that his services would not be required for ensuing year, and not included in exceptions mentioned in board's minutes of re-election of all certificated employees of junior college district, *held* re-elected for such year, so that board had power to classify him as permanent employee of district, though it reduced his working time (School Code, § 5.401; § 5.501 as added by St.1931, p. 1394).

2. Estoppel ⇐62(6)

City board of education, instructing school superintendent to notify certain probationary teachers of their discharge, giving notice of reduction in working time of another such teacher, sending him two contracts stating that he would be classified as permanent employee of junior college district on acceptance thereof, and employing him thereunder for two years, *held* estopped to deny that he was classified as permanent teacher (School Code, § 5.501, as added by St.1931, p. 1394).

3. Schools and school districts ⇐141(2)

Statute providing for permanent employment of probationary teachers by school districts *held* not to authorize governing boards thereof to discharge permanent teachers by reducing time of their employment to such brief periods as would be equivalent to dismissal while permitting employment of teachers without permanent status (School Code, § 5.501, as added by St.1931, p. 1394).

4. Schools and school districts ⇐136

Discharged teacher, relying on estoppel of city board of education to deny his classification as permanent employee of junior college district in proceeding to compel his

reinstatement and agreeing to contract of employment for one-fourth time services, acquired permanent status for such time only (School Code, § 5.501, as added by St. 1931, p. 1394).

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

Proceeding by Harry Huston Crawford against the Board of Education of the City of Glendale and others. Judgment for defendants, and plaintiff appeals.

Reversed.

Tanner, Odell & Taft and Robert A. Odell, all of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel and W. B. McKesson, Deputy Co. Counsel, both of Los Angeles, for respondents.

PER CURIAM.

Plaintiff filed his petition in the superior court seeking to compel the Board of Education of the City of Glendale to reinstate him as a teacher in the Glendale Junior College district and to compel the issuance of warrants for unpaid instalments of his salary. From a judgment in favor of defendants he prosecutes this appeal.

Plaintiff was employed as a teacher in the Glendale Junior College district, which has an average daily attendance of less than 850, for the school years 1929–1930 and was by the Board of Education classified as and became a probationary teacher. He served as such for three consecutive years. At the beginning of the fourth year, June 17, 1932, the board sent to him a form of contract in which it was stated that upon his acceptance thereof he would be classified by the board as a permanent teacher. Upon this contract, which was on a printed form, was a typewritten statement to the effect that it was a contract for "one-third time services only." Plaintiff signed a written acceptance of this contract and returned it to the board. On September 20, 1932, the board sent a similar contract to plaintiff except that there was a typewritten statement to the effect that it was for "one-half time services only." This contract also specified that upon plaintiff's acceptance thereof he would be classified as a permanent teacher. Plaintiff also signed a written acceptance of this contract and returned it to the board. During the fourth year plaintiff rendered half-time services and at the beginning of the fifth year, on September 12, 1933, the board sent plaintiff a contract for the ensuing year in which it was stated that upon his acceptance of the contract he would be classified as a permanent teacher. On this contract there was typed the statement that it was for "one-fourth time services only." Plaintiff signed a written acceptance of this contract and returned it to the board with a letter in the following language: "I am herewith returning my contract, properly executed by myself, accepting employment in the Glendale Junior College District, as a permanent Teacher. In order that there may be no misunderstanding about the matter, I wish to state that I hold myself in readiness to teach any number of classes in Aeronautics or any other subject offered at Glendale Junior College (I hold a general secondary credential), up to a full time loan in the Glendale Junior College. It is my understanding that by teaching part time in Aeronautics only, that I in no way surrender my status as a permanent teacher in the Glendale Junior College." During plaintiff's first probationary year he taught mathematics, orientation, physics and aviation. During the second and third years he taught mathematics, orientation and aviation. During the fourth year he taught mathematics, orientation, and aviation, but certain of his classes in mathematics and orientation were given to other teachers. During the fifth year he was restricted to aviation. During all of the fourth and fifth years there were employed in the district involved a number of probationary teachers some of whom were teaching subjects which plaintiff was certificated to teach. There has been no decrease in the enrollment or attendance of pupils in the district. No charges have been preferred against plaintiff. During all the years involved plaintiff has been duly certificated and qualified to teach all of the subjects offered in the school of the district. At the end of the fifth year plaintiff was notified that his services would not be required for the ensuing school year.

[1] The rights of plaintiff are governed by section 5.501 of the School Code, as added by St.1931, p. 1394: "Every employee of a school district of any type or class, having an average daily attendance of less than 850 pupils, who, after having been employed by the district for three complete consecutive school years in a position, or positions, requiring certification qualifications and is reelected for the next

succeeding school year to a position requiring certification qualifications, may be classified by the governing board of the district as a permanent employee of the district. If said classification be not made the employee shall not attain permanent status and may be reelected from year to year thereafter without becoming a permanent employee until said classification is made." It is conceded that plaintiff was employed by the district for three consecutive years in a position requiring certification qualifications. Defendants deny that plaintiff was reelected and that he was classified by the governing board of the district as a permanent employee. We have concluded that the evidence requires the conclusion that neither of these denials can be upheld.

The board had the power to discharge plaintiff before May 15, 1932. Probationary teachers are deemed re-elected in the absence of action by the board to discharge them from the employment. In section 5.401 of the School Code (St.1929, p. 335) it is provided: "Persons in positions requiring certification qualifications may be elected for the next ensuing school year on or after the first meeting of the governing board of the district as reorganized on the first day of May, and each person so elected shall be deemed reelected from year to year except as hereinafter provided." At its meeting of May 10, 1932, the board took action directing that certain probationary teachers be discharged before May 15, 1932. The list of those to be discharged did not include the name of plaintiff. The minutes of the board show the following in reference to plaintiff: "Reduction in time: Dr. H. H. Crawford, mathematics, aviation and orientation. Reduction of time from full time to one-third time." Plaintiff was not notified prior to May 15, 1932, that his services would not be required for the ensuing year. In the minutes of the board the following also appears: "All certificated employees from the * * * Glendale Junior College District, with the exceptions as indicated above [not including plaintiff] and with the exception of probationary teachers notified on or before May 15, 1932, that their services would not be required during the year 1932–33, be reelected for the school year 1932–33. Salaries to be according to the regular schedules with the cut applied as outlined above. Assignments to be made at a later date, and that the Superintendent be instructed to proceed with the preparation of contracts." It is evident that plaintiff was not only re-elected automatically, but that the board by affirmative action declared him to be re-elected for the ensuing school year. The fact that plaintiff's time was reduced does not efface the affirmative action of the board by which he was actually re-elected. It follows from the re-election of plaintiff that the board had the power to classify him as a permanent employee of the district.

[2-4] It is argued by defendants that the board took no formal action to bring about plaintiff's classification as a permanent employee. It is apparent from the record that the board was attempting to bring about economies in the administration of school affairs. At the meeting of the board at which there was presented "the report of the committee of costs and budgetary economies" the following appears in the minutes: "After detailed discussion, with appreciation for the attitude of the teachers in their generous offer to the Board to take a reduction in salary in lieu of discharging their fellow teachers, and for the protection of the Board, it was moved by Mr. Davidson, seconded by Mr. Hibben, that the following recommendations be approved, the superintendent being instructed to notify the probationary teachers being dropped before May 15, and indicate to them the regret of the Board in having to take this step and the possibility of reinstatement where vacancies might occur." Then follow the names of the teachers to be dropped, and the notice as to plaintiff herein above set forth. During the month of June next succeeding a contract was sent to plaintiff signed by the president and secretary of the board, both members thereof, in which it was stated that plaintiff upon his acceptance of the contract would be classified as a permanent employee. In the following September a similar contract was sent to plaintiff providing for one-half time services. For two years plaintiff rendered services under such contracts. Under such circumstances the court must uphold plaintiff's contention that the board is estopped to deny that he has been permanently classified. The question involved was decided in Briney v. Santa Ana High School Dist., 131 Cal. App. 357, 21 P.(2d) 610. In that case Miss Briney had taught the requisite period and the board had the power to classify her as a permanent employee but took no formal action to do so. She was tendered a contract in which it was stated

that she had been classified by the board as a permanent employee. She rendered services and thereafter was notified by the board that her services would not be continued for the reason that there was "pressing need to reduce personnel in the interest of economy and tax reduction." In upholding her right to permanent tenure the court said: "It is admitted that the board of education at no time during the employment of respondent took any formal action to classify her other than by the execution of her contracts. * * * Under this state of facts, respondent having accepted her contract, rendered her services for the year in question, and having been paid her compensation by the school district after the contract had been filed with the superintendent of schools in Orange county and among the records of the district, and wherein it was stated that she was classified as a permanent employee, is the district estopped from now denying that she was classified as a permanent employee? We think the answer to this question must be in the affirmative." In the Briney Case classification was optional with the board of education and it was optional in the present case. The reasons for the application of the doctrine of estoppel in the Briney Case are present in the case now before us. In Barnhardt v. Gray, 15 Cal.App.(2d) 307, 59 P.(2d) 454, 457, the court in referring to the Briney Case said: "As stated in the opinion, it was within the power of appellants to give the petitioner the classification of a permanent employee at the time the contract was issued and delivered to her. No formal action of the board of trustees was held to be further necessary. The issuance of the contract, at a time when the board had power so to do, and delivering same to petitioner was of the same force and effect as though formal action had been taken, and estopped the board from denying that the petitioner had been so classified." Petitioner co-operated with the board in its endeavor to effect economies. In doing so he relied upon the statement in the contract signed by the spokesman for the board and the officers thereof that his tenure would be permanent. In providing for permanent employment of teachers the Legislature did not contemplate giving the governing boards authority to discharge permanent teachers by reducing the time of their employment to such brief periods as would be equivalent to dismissal, while at the same time permitting the employment of teachers not having a permanent status. Under the circumstances shown equity should and will preserve plaintiff's rights. Since plaintiff is relying upon the doctrine of estoppel and has agreed to a contract for one-fourth time services he must be held to have acquired a permanent status for one-fourth time.

The judgment is reversed.



20 Cal.App.2d 530

SCHWARTZ v. EDMUNDS.

Civ. 5789.

District Court of Appeal, Third District, California.

April 26, 1937.

Rehearing Denied May 26, 1937.

Hearing Denied by Supreme Court June 24, 1937.

1. Limitation of actions ⇐197(3)

Failure to record agreement to extend maturity of note and mortgage until 13 months after mortgagor's death *held* insufficient to establish executor's contention that extension was not executed, and hence that foreclosure suit was barred by statute of limitations.

2. Limitation of actions ⇐146(3)

Extension of maturity of note and mortgage by mortgagee *held* valid, though not signed by mortgagor, so that foreclosure suit was not barred by statute of limitations (Civ.Code, § 2922; Code Civ.Proc. § 360).

3. Limitation of actions 83(2)

Mortgage foreclosure suit, commenced within year after issuance of letters testamentary to executor of estate of mortgagor, who died within four years after original maturity date of mortgage and note secured thereby, *held* not barred by statute of limitations (Code Civ.Proc. § 353; § 337, as amended by St.1933, p. 2116).

4. Executors and administrators ⇐443(7)

Complaint, not asking deficiency judgment in mortgage foreclosure suit against executor of deceased mortgagor's estate, stated cause of action, though not alleging that plaintiff first filed claim with court clerk or presented it to executor, nor expressly waiving recourse against other property of estate (Probate Code, § 716).

5. Appeal and error ⇐1170(3)

Omission from complaint of waiver of deficiency judgment, not asked for therein nor granted by court in mortgage foreclosure suit against executor of deceased mortgagor's estate, *held* not prejudicial to defendant and hence not ground for reversal of foreclosure judgment (Code Civ.Proc. § 475; Probate Code, § 716).

6. Executors and administrators ⇐431(3)

Mortgagee, not filing with court clerk nor presenting to executor of deceased mortgagor's estate claim for attorney's fees and expense of title examination, could not recover costs or counsel fees in foreclosure suit against executor (Probate Code, § 716).

Appeal from Superior Court, Los Angeles County; Arthur Coats, Judge.

Action by Minnie Schwartz against Edgar C. Edmunds, as executor of the estate of Mary Edmunds, deceased, to foreclose a mortgage. From a judgment of foreclosure, defendant appeals.

Modified in part and affirmed in part.

Lloyd S. Nix, of Los Angeles, for appellant.

C. S. Davis, of Los Angeles, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

From a judgment of foreclosure this appeal is taken. The action was commenced April 13, 1935, against Edgar C. Edmunds, as executor of the estate of Mary Edmunds, deceased, for the foreclosure of a mortgage dated January 18, 1928, given to secure the repayment of a promissory note of even date therewith.

Mary Edmunds died December 7, 1933, and on November 21, 1934, letters testamentary were issued to appellant herein. In the complaint it is alleged that on the 14th day of January, 1931, at the request of the said Mary Edmunds, plaintiff herein executed an extension of the maturity of said note and mortgage to January 18, 1933, which extension was duly acknowledged but not recorded until January 7, 1935, some thirteen months after the death of Mrs. Edmunds. The answer avers this fact and alleges that she did not consent to any extension, and further that said extension was not delivered to Mary Edmunds during her lifetime, and as a separate defense set up the statute of limitations. Findings were signed in accordance with the allegations of the complaint and a decree entered directing the sale of the mortgaged property to satisfy the principal and interest of the note, together with $22 expended under the terms of the mortgage for an abstract of title, and $160 as attorney fees.

It is the first contention of appellant that the extension agreement was invalid and inoperative because not signed by the mortgagor, and therefore the action was barred by the statute of limitations, citing section 2922 of the Civil Code, which provides that a mortgage can be created, renewed, or extended only by a writing executed with the same formalities as required in the case of a grant of real property, and citing also section 360 of the Code of Civil Procedure to the effect no acknowledgment or promise is sufficient evidence of a continuing contract unless the same is contained in some writing signed by the party to be charged thereby.

[1] Also as a circumstance contradicting execution of the extension, appellant calls attention to the fact that the extension agreement was not recorded until some thirteen months after the death of Mrs. Edmunds. That fact alone, of course, would not establish the contention of appellant.

[2] The fact, too, that the mortgagor did not sign the extension is immaterial. In Smith v. Lawrence, 38 Cal. 24, 99 Am. Dec. 344, Smith, the payee of two notes, by a valid agreement in writing, signed by him only, promised the defendant, the payer, that he would forbear to sue or demand payment thereof until the happening of a particular event. The court held that the statute was suspended until the event occurred, and in so holding, the court said: "No sufficient reason is suggested why the agreement is not valid. It is not necessary, as insisted by the defendant, that he should have signed the agreement in order to render it valid, for the agreement did not provide that any act should be performed by him; but it is enough that it was binding upon the plaintiff. * * * The payee of the notes is entitled to the full term of four years in which to commence his action, and the extension of the time for the payment of the notes, did not deprive the payee of any portion of that time." The extension being valid, the action was within the statute of limitations.

[3] However, had there been no extension agreement the right of plaintiff would

not have been barred by the provisions of section 337 of the Code of Civil Procedure (as amended by St.1933, p. 2116). It will be remembered that the note and mortgage was executed on January 18, 1928, to mature on January 18, 1931, and the same would not have outlawed until four years thereafter, or January 18, 1935. Mrs. Edmunds, the mortgagor, however, died on December 7, 1933, before the statute had run, and letters testamentary were granted on November 21, 1934. Under section 353 of the Code of Civil Procedure, if a person against whom an action may be brought died before the expiration of the time for the commencement thereof, and the cause of action survived, the action may be commenced against his representative after the expiration of that time and within one year after the issuing of letters testamentary. The present action was commenced on April 13, 1935.

[4] No claim based upon this obligation was ever presented to the executor of the estate, and appellant contends that a complaint for foreclosure of a mortgage brought against the executor, which neither alleged that a claim had been first filed with the clerk or presented to the executor nor expressly waiving all recourse against any other property, does not state a cause of action.

Section 716 of the Probate Code provides that the holder of a claim against an estate must file the same with the clerk or present the same to the executor, except that an action may be brought by the holder of a mortgage against the property of the estate subject thereto where all recourse against any other property of the estate is expressly waived in the complaint, and that no counsel fees shall be recovered in such action unless the claim was filed or presented in accordance with this section. The complaint in this case did not expressly waive recourse against other property of the estate, but it did not ask for a deficiency judgment and the decree of foreclosure did not provide for any deficiency judgment, so in effect at least, the complaint did waive recourse against any other property.

[5] Section 475 of the Code of Civil Procedure provides that no error is to be regarded unless it affects substantial rights, and if such rights are not affected, the court must disregard any error or defect in the pleadings or proceedings, and no judgment or decree shall be reversed by reason of any error unless it shall appear from the record that such error was prejudicial and that the party complaining suffered substantial injury. It clearly appears here that appellant was not prejudiced by the omission to include in the complaint any waiver as to the deficiency judgment when the same was not asked for nor granted by the court.

[6] It does appear, however, that the complaint and decree of foreclosure asked for and allowed attorney fees in the sum of $160, and $22 for the expense of examination of the title. Inasmuch as the claim was not filed with the clerk nor presented to the executor under section 716 of the Probate Code, supra, no costs or counsel fees could be recovered.

The judgment and decree is therefore modified by reducing the amount of the judgment in the sum of $182. In all other respects the judgment should be affirmed, and it is so ordered. Respondent to recover costs on appeal.

We concur: PLUMMER, J.; HELD, Justice pro tem.



20 Cal.App.2d 546

NEILSEN v. RICHTER.

Civ. 1786.

District Court of Appeal, Fourth District, California.

April 26, 1937.

1. Contracts ⇐169

Contract is to be construed in light of surrounding circumstances (Civ.Code, § 1647; Code Civ.Proc., § 1860).

2. Evidence ⇐469

In action for rental of oil drilling equipment, exclusion of evidence to establish parol contract entered into prior to execution of written contract under which defendant asserted payment in full for use of drilling equipment for part of time for which rental was sought under written contract *held* reversible error.

3. Evidence ⇐432

Defense of failure of consideration does not attempt to vary terms of written con-

tract within parol evidence rule, but attacks existence of contract and renders it unenforceable if proven.

4. Appeal and error ⇐1041(3)

In action for rental for oil drilling equipment, refusal to permit defendant to file amendment to answer during trial *held* not prejudicial error, where proposed amendment added nothing material to defenses, which were already pleaded in answer and amendment to answer.

5. Appeal and error ⇐1048(6)

In action for rental for oil drilling equipment, restriction of interrogation of defendant who had been called as witness for plaintiff *held* prejudicial error, where defendant was not permitted to testify solely on same subject as witness in his own behalf (Code Civ.Proc., § 2055).

Appeal from Superior Court, Kern County; Allan B. Campbell, Judge.

Action by M. K. Neilsen against E. R. Richter. Judgment for plaintiff, and defendant appeals.

Reversed.

Frederick E. Hoar, of Bakersfield, and Swaffield & Swaffield, Kenneth Sperry, and Joseph E. Madden, all of Long Beach, for appellant.

Claflin & Dorsey, of Bakersfield, for respondent.

MARKS, Justice.

Plaintiff recovered judgment for $1,545 for rental of drilling equipment used in drilling an oil well in Kern county.

It is alleged in the amended complaint that prior to January 7, 1934, plaintiff rented to defendant rotary oil well drilling equipment at a daily charge of $15; that defendant used the equipment from January 7 to July 13, 1934, both days inclusive, and has paid no part of the rental.

All the allegations of the amended complaint are denied in the answer. Three special defenses are set up in an amendment to the answer. We need only concern ourselves with two of them. In the first it is alleged that the equipment had been rented for the sum of $200 which defendant had paid plaintiff in full. In the third it is alleged that the written agreement which forms the basis of plaintiff's cause of action was without consideration and therefore void.

The written contract provides as follows:

"December 7th, 1933

"I hereby consent to the use by your representatives, successors or assigns, for a period of thirty days without charge, of that certain personal property belonging to me situated on the East half of the Northwest quarter of the northwest quarter of section 15-27-28, Kern County, California, and described as a steam engine, draw works, cable, swivel, hook, traveling block and pipe fittings. If custody of said property be detained past thirty days a charge of fifteen dollars a day will be made for each and every day that said property remains on/or is used on said property and and/or until redelivered to me at 2605 Q Street, Bakersfield. Haulage charges will be at your expense. Very truly yours, M. K. Neilson. I hereby consent to the above terms for use. Edward Richter."

Plaintiff introduced this contract in evidence, proved that the equipment had been in the possession of defendant; that some part of it had been returned several months after January 7, 1934; that some of it had not been returned; that no rent had been paid for the period following January 7, 1934.

At the trial defendant took the position that the contract was ambiguous for the reason that it could not be ascertained from its language from whom plaintiff was to receive the rental. He attempted to introduce evidence of the declarations of the parties and the circumstances existing at and before its execution. This evidence was excluded on the ground that it was an attempt to vary by parol the terms of a written contract.

[1] In Hansen v. D'Artenay, 121 Cal. App. 746, 9 P.(2d) 889, 891, it is said:

"Circumstances surrounding the parties executing a contract, and well known to them at the time, are often of great assistance in interpreting their intention where the express terms of the contract are not clear and where a dispute later arises. 'A court is not only to take a contract by all its corners, but is to be placed in the seats of the parties when it was made. In other words, a contract is to be construed in the light and with the knowledge of surrounding circumstances.' 6 Cal.Jur. 294; section 1647, Civ.Code; section 1860, Code Civ.Proc.; Stein v. Archibald, 151 Cal. 220, 90 P. 536; Peterson v. Wagner, 52 Cal.App. 1, 198 P. 25."

Defendant also attempted to introduce evidence in support of the two special defenses we have mentioned. This evidence was largely excluded by the trial court.

It should not be necessary to lengthen this opinion by detailing the particular rulings made or the theory of defendant in support of these defenses as gleaned from the bits of evidence admitted and the proffers of proof made by his counsel after objections to his questions had been sustained. It should be sufficient to say that he was deprived of the benefit of both defenses if he had evidence to support them.

[2, 3] Neither defense tended to vary the terms of the written contract. The first was intended to establish a prior parol contract (assuming its validity without passing upon it) under which defendant maintained that he had paid, and plaintiff had received payment in full for use of the drilling equipment for a considerable portion of the time for which plaintiff was given judgment for rental of $15 a day. The defense of failure of consideration does not attempt to vary the terms of a written contract. It attacks the very existence of the contract and, if proven, renders it unenforceable.

[4] Defendant urges that the refusal of the trial court to permit him to file amendments to his answer during the trial was erroneous and prejudicial. We do not so regard these rulings. The proposed amendments added nothing material to his defenses which were already pleaded in his answer to the amended complaint and his amendment to this answer.

[5] He complains of rulings of the trial court in restricting the interrogation of defendant who had been called as a witness for plaintiff under the provisions of section 2055 of the Code of Civil Procedure. Ordinarily, such rulings might not be prejudicial if the defendant when called as a witness in his own behalf were permitted to testify fully on the same subjects. Here he was not permitted to do so. This rendered the erroneous rulings prejudicial. Bitsekas v. Parechanian, 67 Cal.App. 148, 226 P. 974. See, also, Goehring v. Rogers, 67 Cal.App. 260, 227 P. 689.

Defendant was deprived of his day in court. He was deprived of the benefit of two special defenses. One of them, if established, might have had an important bearing on a correct interpretation of the none too certain terms of the writing of December 7, 1933, and might have materially reduced the amount of plaintiff's recovery if it would not have defeated it entirely. This question we do not feel called upon to decide. The defense of lack of consideration, if established, in itself would have been a complete defense.

Judgment reversed.

We concur: BARNARD, P. J.; JENNINGS, J.



20 Cal.App.2d 486

STATE OF OHIO ex rel. SQUIRE v. CITIZENS NAT. TRUST & SAVINGS BANK OF LOS ANGELES.

Civ. 11313.

District Court of Appeal, Second District, Division 2, California.

April 22, 1937.

1. Executors and administrators ⇐227(1)

One presenting a claim to an executor is not required to state facts with same precision and detail necessary in a complaint.

2. Executors and administrators ⇐239

Technical objection by executor to manner of presentation of claim against estate *held* not reviewable under stipulation of parties that claimant "performed all legal requirements in connection with the claim," in absence of showing that claim was unjust or unlawful.

3. Pleading ⇐250

In suit by superintendent of banks against executor of deceased bank stockholder, to recover on stockholders' agreement, wherein executor's answer raised question of agreed plan for resumption of banking business, under which superintendent of banks was entitled to sequestration of funds to pay the claim, permitting amendment of petition so as to set forth such plan for resumption of business *held* not error, since amendment dealt with relief which executor's answer showed to be allowable.

4. Executors and administrators ⇐453(2)

In action on rejected claim against an estate, requiring defendant to deposit with clerk of court a sum sufficient to meet plaintiff's claim *held* proper, despite absence of evidence showing necessity for sequestra-

tion, where sequestration was justifiable under pleadings and admitted facts and executor did not claim that other creditors would not be paid in full.

5. Executors and administrators ⇐267

Where claim is presented without mention of interest, interest is not allowable except after date of rejection of the claim.

6. Banks and banking ⇐47(2)

In action by superintendent of banks against executor to collect assessments against deceased stockholder made under agreement for resumption of business by insolvent bank, judgment permitting superintendent of banks to determine amount of assessment *held* error, since superintendent should show, and executor should be given opportunity to question, accuracy of superintendent's certificate of liability.

Appeal from Superior Court, Los Angeles County; Goodwin J. Knight, Judge.

Proceeding on a claim by the State of Ohio, on the relation of S. H. Squire, superintendent of banks in charge of the liquidation of the First Central Trust Company of Akron, Ohio, against the Citizens National Trust & Savings Bank of Los Angeles, executor of the estate of Ella A. Stanley, deceased. From a judgment for plaintiff, defendant appeals.

Reversed and remanded with directions.

Edgar G. Pratt and Irwin M. Fulop, both of Los Angeles, for appellant.

Tscharner & Miller, of Azusa (Herbert S. Duffy, Atty. Gen., of Ohio, of counsel), for respondent.

WOOD, Justice.

Defendant appeals from a judgment rendered in plaintiff's favor in an action upon a rejected claim filed against the estate of Ella A. Stanley, deceased. During her lifetime the decedent was a stockholder of the First-Central Trust Company, a state bank of Akron, Ohio. The bank became insolvent and was taken over by the superintendent of banks of Ohio who caused an assessment to be levied upon the stockholders of record in the sum of $50 for each share. The decedent owned 100 shares of the stock and the assessment which was levied upon this stock was in the sum of $5,000 with interest at 6 per cent. on any amount remaining unpaid after September 23, 1933. A written plan for resumption of banking business was put into effect by the various stockholders and this was signed by the decedent during her lifetime. Under its terms she paid the sum of $500 and agreed that the balance: "Or such part as may be necessary, shall be collected by the superintendent three years after the time of resumption of business by the bank in the event that any sum then remains owed to the depositors and creditors of the present bank." The bank resumed business January 15, 1934. The plan contained the following provision: "All the stockholders of the bank consenting to this plan agree as a part thereof that property and assets now owned by them will not be conveyed or transferred during said three year period, except for value, and that all said property and assets or anything received in exchange therefor will be subject to the payment of such part of their unpaid assessment as may be necessary to discharge completely any amount owed to the depositors and creditors of the present bank."

Defendant notified plaintiff of the death of Ella A. Stanley and asked for details of any transaction pending at the bank. Plaintiff answered on October 8, 1935, and inclosed a claim against the estate in the sum of $4,500, setting forth among other things the date of maturity as January 15, 1937. Plaintiff expressed lack of familiarity with the presentation of claims against estates in California and suggested that if the claims presented were not satisfactory plaintiff would be glad to be advised in order to meet with the California requirements. Plaintiff also inclosed in its letter of October 8, 1935, a copy of the plan for resumption of banking business, to which was attached the consent which had been signed by Ella A. Stanley. The claim was accompanied by an affidavit setting forth the facts. Under date of October 18, 1935, defendant's attorney wrote to plaintiff asking for additional information as to when the balance of the assessment would be due. To this letter plaintiff replied on November 7, 1935, inclosing an additional affidavit in verification of its claim, sworn to under date of October 30, 1935. The claim was rejected by the executor and on November 21, 1935, the claim bearing the word "rejected" was filed with the clerk of the court.

In the original complaint plaintiff asked for judgment in the sum of $4,500. In its answer defendant set forth matters concerning the execution of the plan for resumption

of banking business. At the trial plaintiff filed with permission of the court an amendment to the complaint in which the execution of the plan was set forth together with allegations that the estate was solvent and was ready for distribution. Plaintiff, in addition to the relief asked in the original complaint, prayed as an alternative relief that the court order the amount of plaintiff's claim be paid into court. After trial, the court entered its judgment ordering that the amount of plaintiff's claim be deposited with the clerk of the court.

[1, 2] Defendant presents many technical objections to the action of the court. It is argued that as a contingent claim the particulars thereof are not sufficiently stated; that the claim is upon a written instrument and a copy thereof is not attached to the claim, although inclosed in the envelope with it. One presenting a claim to an executor is not required to state the facts with the precision and detail necessary in a complaint. Dugand v. Magnus, 107 Cal.App. 243, 290 P. 309. It is not necessary, however, to rely upon this rule or to pass upon the validity of defendant's objections, since it was stipulated that plaintiff "performed all the legal requirements in connection with the liquidation of the bank, and in connection with the claim of the plaintiff against the defendant herein." In relying upon this stipulation, plaintiff cannot be subjected to criticism. It was conceded at the trial that plaintiff has a good cause of action and nowhere in the record do we find any evidence to indicate to the court that plaintiff's claim is not just and lawful.

[3] Defendant complains of the ruling of the court permitting plaintiff to file the amendment to the complaint setting forth the agreement which was brought about by the consent of the decedent to the plan. The matter of the plan for resumption of banking business first came into the pleadings by the answer filed by the defendant. The answer itself shows that the plaintiff is entitled to a sequestration of sufficient funds to pay plaintiff's claim on its due date. The defendant cannot object to the granting of the relief to which by its answer it showed plaintiff was entitled.

[4] The action of the court in requiring the defendant to deposit with the clerk a sum sufficient to meet plaintiff's claim was proper. Newman v. Burwell, 216 Cal. 608, 15 P.(2d) 511; Sime v. Hunter, 50 Cal.App. 629, 195 P. 935. Defendant complains that no evidence was introduced showing the necessity for the sequestration. From the record before the court, the pleadings and admitted facts, the court was justified in making the order without the presentation of testimony showing further necessity. It is not claimed by defendant that other creditors will not be paid in full or that funds are not in his hands with which to pay all claims in full.

[5] The claim was presented for the sum of $4,500 without mention of interest. Under the California decisions we are compelled to hold that interest is not allowable except after the date of the rejection of the claim. 11B Cal.Jur. 660, and cases cited.

[6] The court ordered that the sum to be deposited "shall be paid to the plaintiff on or after January 15, 1937, upon the receipt of plaintiff's attorneys of record, immediately upon the filing with said Clerk by the then Superintendent of Banks of the State of Ohio a Certificate showing the amount of such stockholders liability at that time payable by Ella A. Stanley or her executor under the terms of the Plan for Resumption of Banking Business by The First-Central Trust Company, Akron, Ohio, and the Consent thereto of Ella A. Stanley." By this order the court placed it entirely within the power of the superintendent of banks of Ohio to determine the amount due upon the claim. This part of the order was erroneous. Defendant should be given the opportunity to question the accuracy of the certificate of the superintendent of banks if he cares to do so. Plaintiff has attempted to file with this court a certificate from the superintendent of banks showing the amount due and payable on January 15, 1937. This showing should be made in the trial court.

The judgment is reversed and the cause remanded to the superior court with directions to proceed in accordance with the foregoing opinion.

We concur: CRAIL, P. J.; McCOMB, J.

20 Cal.App.2d 473

BARTON v. CLOUGH et al.

Civ. 10249.

District Court of Appeal, First District, Division 2, California.

April 22, 1937.

Hearing Denied by Supreme Court June 21, 1937.

1. Marshaling assets and securities ⇐6

Holder of lien for boring well for builder on lot in mortgaged tract purchased by latter from mortgagors, to whom he executed second trust deed thereon as security for his note, *held* not entitled to money judgment for damages on ground that his right to have assets marshaled was denied by sale of entire tract under first trust deed by one who purchased it to protect another's interest in land, which latter purchased from builder without obtaining deed thereof, after refusing to accept inadequate bids for all lots when offered separately and receiving no bid for entire tract with exception of lots purchased; such sale being authorized (Civ. Code, §§ 2899, 3433).

2. Mortgages ⇐360

Trust deed foreclosure sale, fairly conducted by one who purchased such instrument primarily to protect interest of another, who had paid considerable amount for certain lots in mortgaged tract, on which vendor had executed second trust deed, without violating rights of holder of subordinate lien for boring well on another lot therein or other persons interested in property, *held* not fraudulent as abuse of power of sale under trust deed; foreclosure not being had solely for purpose of defeating subordinate lienholder's rights.

Appeal from Superior Court, Santa Clara County; William F. James, Judge.

Action by Harold E. Barton against George A. Clough, and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Frank V. Campbell and L. H. Schellbach, both of San Jose, for appellant.

George A. Clough and Tobin & Tobin, all of San Francisco, for respondents.

SPENCE, Justice.

Plaintiff brought this action seeking to set aside a sale under deed of trust or, in the event that he was not entitled to have said sale set aside, then for damages in the sum of $1,304.99. The cause was tried by the court sitting without a jury and from a judgment entered in favor of defendants, plaintiff appeals.

This controversy arose out of the difficulties encountered by a builder in attempting, without sufficient capital, to purchase and develop 23 lots in a tract of land known as the Oak Hill tract, the entire tract consisting of 26 lots. The main parties to this litigation are the plaintiff, who held a lien for work done for the builder in boring a well on lot 2; the defendant George P. Clough, who paid the builder several thousand dollars in a transaction for the purchase of lots 24, 25, and 26 and the construction of a dwelling house thereon without obtaining a deed to said premises; and the defendant George A. Clough, who was a cousin of the last-named defendant and who purchased the first deed of trust upon the premises to protect his cousin's interest therein and thereafter foreclosed under said first deed of trust.

There is practically no conflict in the evidence on the material facts. The original owners executed a first deed of trust upon the premises in 1931 to secure their note for $12,000. Thereafter these owners sold the tract, with the exception of lots 13, 14, and 15, to the builder, who executed a second deed of trust upon the premises to secure his note, for $2,500 in favor of the original owners. The builder then started developing the tract and building certain houses, including the house for defendant George P. Clough on lots 24, 25, and 26. The builder became involved in financial difficulties, many liens were filed and default was made in the payment on both the first and second deeds of trust. In December, 1933, the original owners caused lots 24, 25, and 26 to be reconveyed to the builder and thereafter foreclosed on their second deed of trust. Plaintiff had obtained a judgment establishing his lien on the premises subject only to the priority of the first and second deeds of trust, but it does not appear that there had been a sale pursuant to the order found in the decree in that action. It was stipulated at the trial that the foreclosure of the second deed of trust extinguished all mechanics' liens in so far as the lots other than lots 24, 25, and 26 were concerned and that these last-mentioned lots thereafter remained subject to plaintiff's lien as well as the first deed of trust.

When the notice of default and demand for sale was made under the first deed of

trust, defendant George P. Clough found himself in the position where his interest in lots 24, 25, and 26 were seriously jeopardized. Thereupon defendant George A. Clough purchased the first deed of trust in order to protect his cousin's interest and he substituted new trustees. Litigation was threatened by various persons interested in the property and numerous conferences were held in an endeavor to work out some means of protecting these various persons in so far as that might be done. A purported agreement regarding the foreclosure of the first deed of trust was entered into but the authority of the persons executing said agreement was denied by plaintiff and others at or about the time of the foreclosure sale. Notice of sale was given by the trustees and thereafer plaintiff made a demand upon defendant George A. Clough and the trustees "that you offer to sell and sell the property covered by your deed of trust, excluding said Lots 24, 25 and 26, or so much thereof as may be sufficient to satisfy your deed of trust before you offer for sale or sell the said Lots 24, 25 and 26; that you first offer for sale the said lots individually on which there may be any lien or liens subordinate to your deed of trust."

At the time of sale, several persons attended, including plaintiff and his attorneys. Defendant George A. Clough announced at that time that he would receive bids on the lots separately, but would not sell the same separately unless satisfactory bids were received. This he proceeded to do. Plaintiff protested against offering portions of the property conditionally, but the sale proceeded. Plaintiff entered a bid on each lot as offered separately, most of which bids were merely nominal bids of $10 or $25. As to many lots, plaintiff's bids were the only bids made, but there was competitive bidding on others. The highest bid on any lot was the bid of $525 on lot 21. Plaintiff made bids of $10 each on lots 24, 25, and 26 and these bids were the only bids made upon said lots. The sum total of the best bids for all the lots when offered separately was only $2,800, and said defendant then proceeded to offer for sale as a whole the entire tract with the exception of lots 24, 25, and 26. No bid was received in response to said offer. Said defendant then offered for sale as a whole the entire tract including lots 24, 25, and 26 and entered a bid on his own behalf in the sum of $12,000. This was the only bid received in response to this offer and the property was declared sold to said defendant. At that time, the total amount due to said defendant and secured by said deed of trust was $12,812.41.

Although appellant apparently argues in the first portion of his brief that the sale should be set aside, he concedes at the end of his brief that "since the defendant Hibernia Savings & Loan Society, a corporation, is an innocent third party, appellant is limited to a money judgment for damages instead of having the sale set aside." We need not therefore discuss appellant's contentions set forth in the first portion of his brief with respect to the claimed invalidity of the sale.

[1] Appellant's real contention in support of his claim that he was entitled to a money judgment against certain respondents seems to be based upon his statement that "assuming for the sake of argument the sale was otherwise valid, yet appellant's right to have the assets marshaled was denied." Appellant cites and relies upon sections 2899 and 3433 of the Civil Code, but by the terms of said sections, a creditor is not required to resort to the property in the order therein specified unless it can be done, as stated in said section 2899, "without risk of loss to himself" or, as stated in said section 3433, without impairing his right "to complete satisfaction." It is therefore apparent that appellant's alleged right to compel said respondent to resort to the property in the order specified was a qualified rather than an absolute right. 16 Cal.Jur. 950. Said respondent did first offer for sale the property, excluding said lots 24, 25, and 26, and we believe it was entirely proper for him to make said offer conditionally. Said respondent could not accept any of the inadequate bids then received without risk of loss to himself and without impairing his right to complete satisfaction. He was therefore entitled under the circumstances to sell the entire tract, including said lots 24, 25, and 26, and there is nothing in the record to show that any right of appellant was denied.

[2] In conclusion, we may state that appellant claims in his briefs that the foreclosure was had solely for the purpose of defeating appellant's rights as a subordinate lienholder and that the sale was fraudulent as an abuse of the power of sale under the deed of trust. The record does not sustain these claims. While the record shows that the deed of trust

was purchased primarily for the purpose of protecting the interest of respondent George P. Clough, who has paid several thousand dollars to the builder, it appears that the sale thereunder was fairly conducted and that there was no violation of the rights of appellant or of any other person interested in the property.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



20 Cal.App.2d 463

VAN DENBURGH v. TUNGSTEN REEF MINES CO.

Civ. 11123.

District Court of Appeal, Second District, Division 1, California.

April 21, 1937.

Rehearing Denied May 11, 1937.

1. Evidence ⇐66

Directors of corporation were presumed to have known condition of business of corporation which it was their duty to manage and control.

2. Corporations ⇐399(1)

Secretary of corporation is generally mere ministerial officer whose authority does not extend to transacting ordinary affairs of corporation on independent volition and judgment, but he may be clothed with authority of general manager, and his open and public exercise of such function is notice of such authority.

3. Corporations ⇐432(6)

Existence of authority in subordinate officers of corporation may be established by course of business and practices of corporation and by knowledge which board of directors has, or is presumed to have, of acts of subordinates.

4. Corporations ⇐413

Corporation could not escape liability by denying authority of its secretary, who was acting manager and one of three members of board of directors, to borrow money from another director, where corporation's stock was not assessable, corporation's business was practically at standstill, and money was needed to pay corporation's debt and prevent attachment of its property.

Appeal from Superior Court, Los Angeles County; R. M. Rankin, Judge.

Action by Harry G. Van Denburgh, as administrator of the estate of Emma Beatrice Clark, also known as Mrs. Arthur J. Clark, deceased, against the Tungsten Reef Mines Company. From a judgment in favor of the plaintiff, the defendant appeals.

Affirmed.

Kelby, Lawson & Garroway, of Los Angeles, for appellant.

Oscar S. Elvrum and Robert Young, both of Los Angeles, for respondent.

YORK, Justice.

Emma Beatrice Clark, now deceased, was the widow of A. J. Clark, who prior to his death in November, 1927, owned one-third of the stock of the defendant corporation, which had been theretofore organized for the purpose of acquiring, owning and operating certain mining properties in Cochise county, Ariz. After the death of A. J. Clark and during the period from November, 1927, to and including June, 1934, the mining property of the corporation was inactive so far as production of minerals was concerned, and one George Krieg, the secretary of the company, was acting manager of the mining properties, as well as a member of the board of directors thereof. The other members of said board were Mrs. J. H. Parsons and Emma Beatrice Clark, now deceased.

During this period of nearly seven years, from November 9, 1927, to June 14, 1934, there were apparently seven meetings of the board of directors held, and at four of these meetings there were present only secretary Krieg and the said Emma Beatrice Clark, who was a stockholder, as well as president and director of defendant corporation. Because of the inactivity of defendant's mine, there were no funds in its treasury with which to meet taxes, special assessments upon unpatented claims and expenses for a watchman to guard the property, and an item of $1,700 which had accrued prior to the death of A. J. Clark. Therefore, as money was needed from time to time for these various expenses and because the property was threatened by attachment on account of the $1,700 indebtedness, secretary Krieg notified Mrs. Clark and she advanced various sums of money by sending her check to secretary Krieg, who in turn paid

the bills and made entry thereof in the account books of defendant corporation. This action was brought by plaintiff as administrator of the estate of Emma Beatrice Clark, deceased, to recover the sums advanced with interest, and from a judgment entered in favor of such administrator, defendant corporation prosecutes this appeal.

Appellant contends that the evidence is wholly insufficient to sustain the finding that the relationship of debtor and creditor existed between Emma Beatrice Clark and the defendant corporation; that the evidence is insufficient to sustain the finding that there was an accounting between said Emma Beatrice Clark and the defendant corporation for moneys advanced to the latter, and, further, that the evidence established a voluntary payment on the part of Mrs. Clark.

[1-3] Upon trial of the action secretary Krieg was the only witness examined, although documentary evidence was introduced, which consisted of numerous letters written by Mrs. Clark and by secretary Krieg, copies of the articles of incorporation and by-laws of defendant corporation and its books of account. We have read the testimony and have examined the documents admitted as exhibits in the case, and we are convinced that the findings made by the trial court are amply sustained thereby. The witness Krieg testified that his duties as secretary included the task of keeping the books and records of the company, as well as looking after the affairs of the company in general during the period in question, and that during that time he was the only active business man in the company. In this connection appellant maintains that Krieg was not the acting manager of the corporation, but was following directions given him by his codirector Mrs. Clark. It should not be overlooked that the board of directors of defendant corporation was composed of the president, Mrs. Clark, the secretary Krieg and Mrs. Parsons, and as such they were presumed to have known the condition of the business of the corporation which it was their duty to manage and control. First National Fin. Corp. v. Five-O Drilling Co., 209 Cal. 569, 573, 289 P. 844, 845. The cited case also holds that "As a usual thing the secretary of a corporation is a mere ministerial officer whose authority does not extend to the transaction of the ordinary affairs of the corporation upon his independent volition and judgment. But one who is secretary may also have far more extensive functions than those ordinarily incident to his office. He may be clothed with the authority of a general manager, and his open and public exercise of the functions of such position is notice that he has such authority. Betts v. Southern Cal., etc., Exchange, 144 Cal. 402, 407, 77 P. 993. * * * And so, the existence of authority in subordinate officers may be established by proof of the course of business and by the usages and practices of the company and by the knowledge which the board has, or must be presumed to have, of the acts and doings of its subordinates in and about the affairs of the corporation."

[4] It is shown by the record that the stock of defendant was nonassessable, that various obligations arose which had to be met in order to protect the mining property owned by the corporation as well as to protect the interest of the stockholders during a period when business was practically at a standstill. Furthermore, the tone of the letters written by Emma Beatrice Clark from time to time to secretary Krieg plainly shows that the advances made by her were made at a sacrifice on her part and with the expectation that she would be reimbursed for such advances at a later date, either when the property was sold or business was again active.

The case of Santa Cruz R. Co. v. Spreckles, 65 Cal. 193, 3 P. 661, 666, 802, was one in which the plaintiff corporation sought to recover of defendant, who was a subscriber for shares of capital stock, the amount of his percentage of an assessment levied by the directors to pay a debt due to one Hihn, the president of the corporation, who was also one of its directors. It was there said (65 Cal. 193, at page 199, 3 P. 661, 802): "The money was advanced to and received by the corporation at a time when it was out of money and in debt, and when it was unable to obtain money from any other source than from Hihn. Where a director under such circumstances advances the corporation the needed money, which it receives and uses, there surely would be no justice, and we think no law, in holding that the corporation could not repay the amount."

The judgment is affirmed.

We concur: HOUSER, P. J.; DORAN, J.

20 Cal.App.2d 550

In re COHN'S ESTATE.

COHN v. ANGLO-CALIFORNIA NAT. BANK OF SAN FRANCISCO et al.

Civ. 1851.

District Court of Appeal, Fourth District, California.

April 26, 1937.

1. Executors and administrators ⇐314(12)

On appeal from decree of partial distribution of property of estate, delay in closing estate would not affect decision of appellate court, since remedy for undue delay, if any, lay, in first instance, in probate court.

2. Taxation ⇐903

Inheritance taxes are payable in lawful money, and cannot be paid in realty (St.1935, p. 1279, § 9).

3. Executors and administrators ⇐314(12)

Decree of partial distribution of estate would be reversed, though it provided that sufficient realty be retained in estate to pay inheritance tax, where there was insufficient money in estate to pay tax, since earmarking of realty to be held or sold for purpose of paying tax at some future time is not equivalent to payment of tax in money before property is delivered to distributee as required by statute (Probate Code, § 1024; St.1935, p. 1279, § 9).

Appeal from Superior Court, Kern County; Allan B. Campbell, Judge.

Proceeding in the matter of the estate of Charles Cohn, deceased. From decree of partial distribution to Bertha Cohn, the Anglo-California National Bank of San Francisco, as special administrator of the estate of Charles Cohn, deceased, and the Bank of America National Trust & Savings Association, as executor of the estate of Irving Cohn, deceased, appeal, opposed by Bertha Cohn.

Reversed.

Joseph T. O'Connor, Joseph A. Brown, and Norman A. Eisner, all of San Francisco, for appellant Anglo-California Nat. Bank of San Francisco.

Borton, Petrini & Conron, of Bakersfield, for appellants Irving Cohn and Bank of America Nat. Trust & Savings Assn.

W. H. H. Gentry, Inheritance Tax Atty., and T. H. Christiansen and James W. Hickey, Asst. Inheritance Tax Attys., all of Sacramento, amici curiæ for appellants.

Glikbarg & Wolf, of San Francisco, I. H. Prinzmetal, of Los Angeles, and William R. Hulsy, of Bakersfield, for respondent.

MARKS, Justice.

Irving Cohn died during the pendency of this appeal. The Anglo-California National Bank of San Francisco, as special administrator, has been substituted for him as appellant in his representative capacity. The Bank of America National Trust & Savings Association, as executor, has been substituted for him as appellant in his individual capacity.

This is an appeal from an order of the probate court directing partial distribution of property of the estate of Charles Cohn, deceased, having an appraised value of approximately $130,000. The portion of the order pertinent to this appeal is as follows:

"It is now ordered, adjudged and decreed that the following described property be and the same is hereby distributed to Bertha Cohn:

"(a) Personal property: 20,088 shares of stock of the Jewett Oil Company.

"3,668 shares of stock of the Monarch Oil Company.

"Cash: $4,513.55

"(b) Real Estate (here follows five pages of property description).

"It is further ordered, adjudged and decreed that out of the real estate hereinabove set forth as distributed, there shall be deducted and retained in the estate, until such time as the inheritance taxes due to the State of California from the said estate shall have been paid, $40,000.00 in value of real estate as determined by the referees in partition heretofore had, and as now distributed * * *".

The only question presented here is the propriety of decreeing a partial distribution before the inheritance tax is paid, or sufficient money is in the hands of the executor or administrator with which to pay it before he delivers the property under the decree of partial distribution.

[1] Counsel for both parties have become acrimonious over the question of delay in closing the estate. While this matter may be of great importance, it cannot

interest us here or affect our decision on this appeal. The remedy for undue delay, if any, lies, in the first instance, in the probate court.

Whether the statutes in effect at the time of the death of deceased (June 22, 1926), or at the date of the decree of partial distribution (December 13, 1935), govern here, is also argued. This question is purely academic. As far as they affect this appeal, statutes in effect on the two dates are of similar import. Section 1669, Code Civ. Proc.; section 1024, Probate Code; section 9, Stats. 1921, pp. 1500, 1510; section 9, Stats.1935, pp. 1266, 1279. For convenience only, we will cite and quote from the Code section and from the statute now in effect without deciding whether the enactments in effect in 1926, or those now in force, are controlling.

Counsel also debate the question of whether the decree of partial distribution, if erroneous, must be reversed because beyond the jurisdiction of the probate court to render, or because it is an erroneous exercise of that jurisdiction. We will not participate in this debate or attempt to decide it as the question is unimportant here. The same result is reached whether we regard the decree as merely erroneous or as beyond the jurisdiction of the probate court.

Section 1024 of the Probate Code provides as follows: "Before any decree of distribution is made, all inheritance taxes due from the distributee and all personal property taxes due and payable by the estate must be paid."

Section 9 of the Inheritance Tax Act of 1935 (Stats.1935, pp. 1266, 1279) provides in part as follows:

"Any administrator, executor or trustee having in charge or trust any legacy or property for distribution, subject to the said tax, shall deduct the tax therefrom, or if the legacy or property be not money he shall collect the tax thereon, upon the market value thereof, from the legatee or person entitled to such property, and he shall not deliver, or be compelled to deliver, any specific legacy or property subject to tax to any person until he shall have collected the tax thereon; and whenever any such legacy shall be charged upon or payable out of real estate the executor, administrator, or trustee shall collect said tax from the distributee thereof, and the same shall remain a charge on such real estate until paid. * * *

"Every sum of money retained by an executor, administrator or trustee, or paid into his hands for any tax on property, shall be paid by him within thirty days thereafter, to the treasurer of the county in which the probate proceedings are pending."

To support the decree of partial distribution respondent cites the cases of In re Estate of Mahoney, 133 Cal. 180, 65 P. 389, 85 Am.St.Rep. 155; In re Estate of Ross, 187 Cal. 454, 202 P. 641; In re Estate of Hill, 94 Cal.App. 113, 270 P. 708; In re Estate of Johnson, 218 Cal. 501, 23 P.(2d) 1012, and In re Estate of Chesney, 1 Cal.App. 30, 81 P. 679.

In each of these cases, except In re Estate of Johnson, supra, it appears there was sufficient cash in the estate to pay the inheritance tax and that the executor or administrator was not required to deliver the property distributed until the tax was paid. This was held sufficient compliance with the law and protection of the interest of the state.

In Re Estate of Johnson, supra, it was remarked that there was evidence negativing the existence of an inheritance tax and that the administrator, the appellant, waived the objection of the failure to prove payment of that tax as a ground for reversal of the decree. It follows that respondent can gain no comfort from that case.

[2, 3] Inheritance taxes are payable in lawful money. They cannot be paid in real estate. Because a decree of partial or final distribution has been approved on appeal where it appeared there was sufficient money in the estate to pay the inheritance tax and this tax was ordered paid before delivery of the property to the distributee, cannot be held to support the decree of partial distribution here. In the instant case inheritance taxes in the sum of about $35,000 had not been paid. It does not appear that there are sufficient moneys in the estate to pay the tax. The earmarking of real property to be held or sold for the purpose of paying the tax at some future time is not equivalent to the payment of the tax in money before property is delivered to the distributee. The state should not be expected to accept the security of real property that may be sold at some future date for present payment in money. The statutes do not authorize such procedure. No decision to which we have been cited has approved it.

The decree of partial distribution is reversed. Appellants will recover their costs on this appeal.

We concur: BARNARD, P. J.; JENNINGS, J.



20 Cal.App.2d 415

CITIZENS STATE BANK OF LONG BEACH v. GENTRY.

BARTLETT v. SAME.

Civ. 14.

District Court of Appeal, Second District, Division 1, California.

April 19, 1937.

Hearing Denied by Supreme Court June 17, 1937.

1. Contracts ⇐107

Contract made contrary to statute designed for protection of public and prescribing penalty for violation thereof is void, since penalty is equivalent of express prohibition.

2. Evidence ⇐67(1)
Licenses ⇐39

Contractor who had license when work was commenced would be deemed to have had license throughout work, so as to be able to maintain action to foreclose lien under statute, where corporation organized by contractor and bearing his name and in which he was dominant figure, secured license on expiration of contractor's license, and work was completed by contractor under auspices of corporation, since contractor and corporation would be considered as single entity (St.1929, p. 1591, as amended by St.1931, pp. 1255, 1264 and St.1933, p. 1492).

3. Appeal and error ⇐1071(1)

Trial court's failure to make more specific findings in respect to issues of facts determined in reports of referee to whom was submitted whole issue regarding amount of compensation claimed by contractor seeking to foreclose lien, *held* not error to require new trial, where referee held hearings, took evidence, made findings which he reported to court, and appeared as witness at trial, where he amplified his reports and explained in detail the manner in which he arrived at his conclusions.

4. Appeal and error ⇐924

Appellate court would assume, in support of judgment in action to foreclose contractor's lien wherein whole issue regarding amount of compensation claimed by contractor was submitted to referee, that every controverted fact was determined in favor of respondents.

5. Appeal and error ⇐687

On appeal from judgment in action to foreclose contractor's lien wherein whole issue regarding amount of compensation claimed by contractor was submitted to referee, any procedure or record from which it could be intelligently ascertained what the issues were as to controverted items and how issues were disposed of by trial court, would suffice for purpose of determining whether there was miscarriage of justice, whether matter appeared from findings, judgment, reporter's transcript, or bill of exceptions showing controversy and disposition thereof (Const. art. 6, § 4½).

6. Contracts ⇐229(2)

In cost-plus contract, operating expenses occasioned by use of equipment are included as part of cost of material.

7. Contracts ⇐229(2)

Premiums incurred for compensation and liability insurance by contractor under cost-plus contract were properly allowed as charges against construction cost, where premiums were included in weekly statements furnished owner and owner paid charges for premiums without demanding explanation.

8. Appeal and error ⇐989

Where findings or judgment are attacked as unsupported by evidence, power of appellate court begins and ends with determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support findings and judgment.

9. Appeal and error ⇐931(1)

On appeal from judgment for plaintiff, all conflicts of evidence must be resolved in favor of plaintiff, and all legitimate and reasonable inferences must be indulged to uphold judgment if possible.

10. Appeal and error ⇐996

When two or more inferences can be reasonably deduced from the facts, reviewing court is without power to substitute its deductions for those of trial judge.

11. Evidence ⇐588

Upon triers of fact rests responsibility to reconcile, if possible, any apparent conflicts, whether the same arises from entire case or testimony of single witness, and to effectuate all the evidence, when nature of case will admit of such disposition, or, if conflict is irreconcilable, to place their own value on contradictory evidence.

12. Appeal and error ⇐931(1)

All intendments are in favor of judgment arrived at upon conflicting testimony.

13. Appeal and error ⇐996

Where contradictory inferences can reasonably be drawn from facts, appellate court will not substitute other inferences for those adopted by trial court, even where appellate court might have reached different conclusion.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Actions by the Citizens State Bank of Long Beach and by George E. Bartlett against Laura M. La Shell, wherein the defendant filed counterclaims. The two actions were consolidated for trial. From the judgment, the defendant appeals. The defendant died pending the appeal, and her executor, Francis H. Gentry, was substituted as defendant and appellant.

Affirmed.

Eugene C. Campbell, of Long Beach, for appellant.

Linnell & Linnell, of Long Beach, for respondent Citizens State Bank of Long Beach.

Irving Smith, of Long Beach, for respondent Geo. E. Bartlett.

WHITE, Justice pro tem.

On March 10, 1933, defendant, Laura M. La Shell, owned two buildings in Long Beach, one a warehouse and the other a theater, both of which were damaged by the earthquake of that date. On April 6, 1933, defendant entered into a written contract with plaintiff Geo. E. Bartlett for the reconstruction of the theater building "on the basis of labor and material plus ten per cent of cost." At approximately the same time, defendant also entered into an oral contract with plaintiff Bartlett for the reconstruction of the warehouse property, under the same terms and conditions as set forth in the written contract covering repair of the theater building. The work of reconstruction on both buildings commenced shortly after the contracts were made and continued until both structures were completed. Work on the warehouse was completed July 19, 1933, and on the theater on August 17, 1933.

On May 9, 1933, the contractor, Bartlett, assigned his prospective compensation for repairing both buildings to the plaintiff Citizens State Bank of Long Beach. Defendant owner accepted both assignments and agreed in writing to pay to the bank the moneys so assigned. On October 18, 1933, plaintiff contractor filed a claim of lien against the theater building in the sum of $3,094.89 for his services in repairing that building.

On October 27, 1933, plaintiff bank commenced its action against defendant to recover the moneys covered by the assignments of May 9, 1933. On January 15, 1934, the contractor, Bartlett, commenced an action to foreclose his claim of lien against the theater building.

Defendant filed answers to both complaints, and set up counterclaims alleging that plaintiff Bartlett was indebted to defendant in the sum of $140 for rent of certain premises leased by the latter to the former; that during the construction work defendant advanced to plaintiff contractor some $2,000 more than he actually paid out for labor and materials; that plaintiff contractor failed to perform the work in a workmanlike manner, was dilatory, inefficient, negligent and neglectful, all of which allegedly damaged defendant in the sum of $5,000; and finally, that plaintiff contractor willfully included in his claim of lien work and materials not performed or furnished for the property described in the claim of lien.

The two actions were consolidated for trial. During the progress of the trial the court appointed a referee "to hear and decide the whole issue regarding the amount of compensation claimed by plaintiff in these entitled actions, respectively, and the claims made by defendant in her counterclaim No. 2 set forth in the answer in said case No. C-6009, including a determination of the charges, credits and offsets and all other matters bearing on the cost of the work on the respective buildings, and the reasonable value of the various items of labor and materials bestowed upon such work." Hearings were

had before the referee, at which time evidence was taken on the items of charge made by plaintiff contractor against defendant and as to all claims of credit for payments made by defendant to the contractor. The referee filed a report, and subsequently tendered an amended report to the court. He was also called as a witness and testified at the trial, which was resumed upon the filing of the referee's reports.

At the conclusion of plaintiff's case defendant moved for a nonsuit in each action, on the ground that plaintiff contractor had no contractor's license from the state of California at the time the action arose, but had nevertheless carried on the building operations without such license. In each case defendant's motion for a nonsuit was denied. At the conclusion of the trial the court rendered a judgment in favor of plaintiffs, and subsequently handed down a nunc pro tunc amended judgment and decree of foreclosure, by the terms of which it was ordered that plaintiffs recover from defendant $2,244.93, with interest and costs. It was further adjudged that the amount due plaintiffs for work done by plaintiff Bartlett on the theater building was the sum of $1,990.17, plus interest and costs, and that plaintiffs have a lien upon the theater property for that amount, and that said property be sold to satisfy such lien. From the judgment aforesaid defendant prosecuted this appeal. Laura M. La Shell, the defendant, died pending the appeal, and her executor, Francis H. Gentry, was substituted as defendant and appellant.

Appellant's first ground of attack upon the judgment is that the court erred in denying the motions for nonsuit. It is earnestly urged that the uncontradicted evidence shows that the construction work in question was carried on from April to August, 1933, and that the contractor's state license as a building contractor expired June 30 of that year. In this regard the record shows that plaintiff Bartlett was a duly licensed contractor for the fiscal year ending June 30, 1933. It appears that prior to that date defendant Bartlett formed a corporation, known as Geo. E. Bartlett Construction Co., and on June 28, 1933, prior to the expiration of plaintiff Bartlett's license, application was made to the registrar of contractors for a renewal of contractor's license. Such application was accompanied by a letter, stating in part as follows: "We would like the renewal issued to Geo. E. Bartlett Construction Co., Ltd., a corporation. Heretofore the license has been carried in Mr. Bartlett's name." After declaring it to be unlawful for any person to engage in the business or act in the capacity of a contractor within this state without having a license therefor, and providing a penalty for so doing, the provision of the act pertinent hereto declares: "No person engaged in the business or acting in the capacity of a contractor as defined by section 3 of this act, shall bring or maintain any action in any court of this State for the collection of compensation for the performance of any act for which a license is required by this act without alleging and proving that such person was a duly licensed contractor at the time the alleged cause of action arose." St.1929, c. 791, p. 1591, as amended St.1931, cc. 578, 582, pp. 1255, 1264; St.1933, c. 573, p. 1492.

[1, 2] It is the contention of appellant that a contract made contrary to the terms of a law designed for the protection of the public and prescribing a penalty for the violation thereof is illegal and void, and no action may be brought to enforce such a contract. Berka v. Woodward, 125 Cal. 119, 57 P. 777, 45 L.R.A. 420, 73 Am.St. Rep. 31. Undoubtedly, the rule in this state is that when it appears there is a violation of a statute designed for the protection of the public, with a penalty prescribed for the violation thereof, that such penalty is the equivalent of an express prohibition, and that a contract made contrary to the terms thereof is void. However, in this case it is undisputed in the evidence that at the time the contract in question was made plaintiff Bartlett possessed the requisite contractor's license. While it is true the same expired during the progress of the work under the contracts, still the plaintiff contractor carried on and completed the work under the auspices of a corporation organized by him, bearing his name, and in which he was the dominant and controlling factor; and which corporation possessed the necessary contractor's license under the state law. In none of the cases cited by appellant did the party suing have a license at the time of entering into the contract and then make an application for a renewal in any manner, such as was done here. In our opinion, where a manifestly unjust and inequitable result would follow a holding that plaintiff contractor was without ca-

pacity to sue on his contract, the individual plaintiff in whose name the license stood at the time the contract was made and the corporate entity organized by him in whose name the license stood at the time the cause of action accrued, should be considered as one. Minifie v. Rowley, 187 Cal. 481, 202 P. 673; Wenban Estate, Inc., v. Hewlett, 193 Cal. 675, 227 P. 723. Under the circumstances disclosed by the record in this case, we are of the opinion that the finding of the trial court that plaintiff contractor Bartlett was licensed was justified, and that the motions for a nonsuit were properly denied.

[3-5] Appellant next urges a reversal on the ground that the findings of fact with reference to her alleged indebtedness to respondents are without support in the evidence and "inherently insufficient." With this claim of appellant we cannot agree. The trial court submitted to the referee "the whole issue regarding the amount of compensation claimed by plaintiff * * * and the claims made by defendant in her counterclaim No. 2 * * * including a determination of the charges, credits and offsets and all other matters bearing upon the cost of the work on the respective buildings, and the reasonable value of the various items of labor and materials bestowed upon such work." As hereinbefore observed, the referee held hearings, took evidence, and not only made findings which he reported to the court, but was also called as a witness at the trial, where, upon examination, he amplified his reports and explained in detail the manner in which he arrived at his conclusions upon the issues submitted to him. The referee's reports and the documentary evidence upon which his findings were based were introduced into evidence. With the record thus constituted, surely it cannot be said that the court's failure to make more specific findings in respect to the issues of fact determined in the referee's reports constituted error so prejudicial to defendant that a new trial should be ordered. In the case before us, the issues between the parties were framed and disposed of in the report of the referee, adopted by the court, in such a manner as to clearly show the method by which the results set forth in the findings were reached, and the appellant was thereby enabled to present her grievances to the appellate tribunal. This court must assume, in support of the judgment, that every controverted fact was determined in favor of the respondents, and even if there were both the disposition and the power on our part to re-examine the entire account between these parties, the presumption in favor of the action of the trial court would ordinarily render such action upon our part wholly nugatory. Under the Constitution (article 6, § 4½), our power to reverse a judgment is restricted to cases where this court, upon the whole record, can say that there has been a miscarriage of justice in the trial court. Any procedure or record from which it can be intelligently ascertained what the issues were as to the controverted items and how these issues were disposed of by the trial court, will suffice for the purpose, whether the matter appears from the findings, the judgment, the reporter's transcript, or a bill of exceptions showing the controversy and the disposition thereof. In the case at bar it can easily be ascertained by referring to the reports of the referee and the exhibits in augmentation thereof, as well as the testimony of the referee, exactly how the referee and the court found upon each item of cost and each item of credit claimed by the parties to this action. What we have just said applies with equal force to the claimed insufficiency of the evidence to support the findings as to respondent bank. The contention that appellant was "left absolutely in the dark as to how the court arrives at these several general conclusions," and that she was entitled to know the method employed by the court in arriving at such conclusions, in view of the entire record in this case, is without merit.

[6, 7] Appellant's next claim of error is that under the contracts here in question respondent contractor was not entitled to recover for equipment used in the reconstruction work. However, in our opinion, in a "cost-plus" contract operating expenses such as are occasioned by the use of equipment are included as a part of the cost of material. Johnson v. Kusminsky, 287 Pa. 425, 135 A. 220; Lytle, Campbell & Co. v. Somers, F. & T. Co., 276 Pa. 409, 120 A. 409, 27 A.L.R. 41. In this connection, and also with reference to appellant's claim that the trial court erred in allowing as charges against the construction cost, premiums incurred for compensation and liability insurance, it may be said that all the items concerning equipment, as well as insurance premiums, were included in weekly statements furnished appellant by respondent contractor,

and she paid the said charges knowingly and without any fraudulent concealment on the part of the contractor. It seems to us that when these weekly statements were furnished to appellant, if there was any doubt about the charges for equipment and insurance premiums, appellant should have demanded an explanation of the same before she paid them.

Our examination of the record impresses us with the fact that there were no errors in the rulings of the trial court upon the admissibility and rejection of evidence.

[8-13] Other points raised by appellant are based upon issues in connection with which the evidence was in conflict, and the trial court resolved such conflicts in favor of respondents. It requires no citation of authority for the statement that when findings or a judgment are attacked as being unsupported by the evidence, the power of the appellate court in passing upon this question begins and ends with the determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support such findings and judgment; and on appeal from a judgment for plaintiffs all conflicts in the evidence must be resolved in favor of such plaintiff, and all legitimate and reasonable inferences indulged in to uphold the judgment, if possible; and when two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial judge. Crawford v. Southern Pacific Co., 3 Cal.(2d) 427, 45 P.(2d) 183. Upon the triers of fact rests the responsibility to reconcile, if possible, any apparent conflict, whether the same arises from the entire case or in the testimony of a single witness, and to effectuate all the evidence, when the nature of the case will admit of such a disposition; or, if the conflict is irreconcilable, to place their own value on the contradictory evidence. Darling v. Pacific Electric Ry. Co., 197 Cal. 702, 708, 242 P. 703. All intendments are in favor of the judgment arrived at upon conflicting testimony. Where the facts are such that contradictory inferences can reasonably be drawn from them, an appellate court will not substitute other inferences for those adopted by the trial court. Hughes v. Quackenbush, 1 Cal.App.(2d) 349, 354, 37 P.(2d) 99. This is the rule even where the reviewing court might have reached a different conclusion.

For the foregoing reasons, the judgment appealed from is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.



20 Cal.App.2d 157

VESPER v. FOREST LAWN CEMETERY ASS'N et al.

Civ. 5771.

District Court of Appeal, Third District, California.

April 2, 1937.

Hearing Denied by Supreme Court May 27, 1937.

1. Cemeteries ⇐15

Owner of private cemetery lot could not maintain action to enjoin operation of mortuary in cemetery in absence of allegation that operation had injured owner.

2. Cemeteries ⇐15

Cemetery lot owner who suffers no injury or damage and whose rights are not invaded and whose easement is not interfered with, and who cannot establish that maintenance of mortuary in cemetery impairs beauty and value of his lot, nor convenience of ingress to nor egress from lot, cannot complain of nor enjoin operation of mortuary.

3. Injunction ⇐1

Issuance of injunction is not matter of right, but rests in discretion of court, which will consider whether greater injury will result to defendant from granting injunction than would be caused to plaintiff in refusing injunction.

4. Cemeteries ⇐15

Owner of private cemetery lot *held* not entitled to injunctive relief against operation of mortuary in cemetery on ground that owner had vested right in cemetery and to uses to which cemetery might be put, and that right had been invaded by the mortuary, in absence of injury to owner.

5. Cemeteries ⇐15

Owner of private cemetery lot, by waiting two years after lease was signed for building of mortuary in cemetery, and more than a year after completion of building and operation of mortuary, before seeking injunctive relief, was thereafter barred by laches from seeking relief, notwithstanding

that owner did not seek destruction of building but only to prevent its use as mortuary, where large sums of money had been spent in equipping building.

6. Nuisance ⇐61

Operation of mortuary is not a "public nuisance."

[Ed. Note.—For other definitions of "Public or Common Nuisance," see Words & Phrases.]

7. Cemeteries ⇐15
Limitation of actions ⇐105(2)

Alleged pendency of test case respecting rights of defendants to conduct mortuary in private cemetery would not toll statute of limitations, or excuse laches of owner of cemetery lot in seeking injunctive relief.

8. Cemeteries ⇐15

Allegation of common-law dedication of property for cemetery purposes did not warrant action by owner of cemetery lot to enjoin operation of mortuary in cemetery, in absence of allegation of damage to owner.

9. Constitutional law ⇐42

Private cemetery lot owner who was not injured by operation of mortuary in cemetery could not complain that general cemetery act, if interpreted to permit operation of mortuaries in cemeteries, deprived owner of substantial property rights in violation of constitutional guarantees of due process, since owner was attempting to anticipate a future condition (St.1931, p. 2434; Const.U.S. Amend 14; Const.Cal. art. 1, § 13).

10. Injunction ⇐12

Cause of action for injunction must exist at time complaint is filed and not when something in future might come to pass.

11. Constitutional law ⇐305

Refusal to permit owner of private cemetery lot to maintain action to enjoin operation of mortuary in cemetery *held* not denial of due process, where owner could obtain fair hearing and impartial determination of his rights in quo warranto proceedings (St.1931, p. 2434; Const.U.S. Amend. 14; Const.Cal. art. 1, § 13).

12. Constitutional law ⇐305

Litigant who has opportunity to be heard some time during proceedings is not denied his constitutional guaranty of due process (Const.U.S. Amend. 14; Const.Cal. art. 1, § 13).

13. Cemeteries ⇐3
Constitutional law ⇐240(1)

General cemetery act, if interpreted to permit operation of mortuaries in cemeteries, but which applied to each member of a general class of lot owners in California cemeteries, did not deny cemetery lot owner equal protection of the laws (St.1931, p. 2434; Const.U.S. Amend. 14).

14. Constitutional law ⇐211

If statute applies impartially to every member of general class, no member of such class can charge that statute deprives him of equal protection of the laws, provided that conduct of Legislature in creating the general plan was reasonable (Const.U.S. Amend. 14).

15. Appeal and error ⇐959(1)
Pleading ⇐236(2)

Privilege of amending complaint after demurrer is sustained rests in trial court's sound discretion, exercise of which will not be disturbed in absence of showing of gross abuse.

16. Corporations ⇐387(2)

Owner of private cemetery lot suing to restrain operation of mortuary in cemetery could not raise question that corporate owner of land dedicated to cemetery was without power to lease portion of cemetery to another corporation for operation of mortuary, since questions concerning exercise of corporate powers cannot be raised collaterally by a third person, but only by state in quo warranto proceedings.

Appeal from Superior Court, Los Angeles County; Raglan Tuttle, Judge.

Action by C. R. Vesper against the Forest Lawn Cemetery Association, a corporation, and others. From a judgment of dismissal, the plaintiff appeals.

Affirmed.

W. I. Gilbert, W. L. Pollard, and S. L. Kurland, all of Los Angeles, for appellant.

Heller, Ehrman, White & McAuliffe, and Martin Minney, Jr., all of San Francisco, and C. F. Cable, of Los Angeles, amici curiæ.

Call & Murphey, of Los Angeles, and Glenn Whitney and Harold Morrison, both of Glendale, for respondents.

Hanna & Morton, Byron C. Hanna and Raymond Brennan, all of Los Angeles, Sullivan, Roche & Johnson, of San Fran-

cisco, and Ed. P. Sample, of San Diego, amici curiæ.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Plaintiff and appellant, C. R. Vesper, as the owner of certain interment space in a lot in Forest Lawn now known as Forest Lawn Memorial-Park, a private cemetery, is seeking by injunction to prevent respondent, and particularly Forest Lawn Memorial-Park Association, Inc., from engaging in the undertaking business for profit in a building situated in Forest Lawn Memorial-Park near Glendale.

To the complaint, a demurrer on behalf of all defendants was interposed and sustained without leave to amend. A motion by plaintiff to reconsider was then filed, and for permission to file an amended complaint. This motion was denied, and a judgment of dismissal was entered, from which judgment this appeal is taken.

This court has been assisted by able briefs presented by respective counsel and by friends of the court, both supporting and attacking the judgment appealed from. We appreciate the importance of a ruling as to whether it is legal to operate a mortuary upon lands which had been dedicated to cemetery purposes under the provision of the General Cemetery Act of California (Stat.1931, c. 1148, p. 2434, Deerings Gen.Laws 1931, Act 1288), but as we view the pleadings before us that question cannot be here considered as we deem it beyond the function of the court to take up issues which lie outside of the immediate scope of the action presented for solution.

[1] We are of the opinion that the judgment of the trial court in sustaining the demurrer to the complaint was correct for the reason that this is an action for injunctive relief, and plaintiff has failed to allege, and from the nature of the facts, cannot allege, that he has sustained an injury.

[2] From the complaint it appears that appellant does not own and has no interest in any of the real property upon which the alleged unauthorized business is being conducted. It also appears that appellant owns no stock of and has no interest in Forest Lawn Memorial-Park Association, Inc., or any of the other defendant corporations. It does not appear that Forest Lawn Memorial-Park Association, Inc., has committed any trespass on or desecration of the plot owned by appellant. It does not appear either in the original complaint or in the proposed amended complaint that the mortuary can be seen from his lots or that the operation of the mortuary has depreciated the value of his lots, or that upon resale he would suffer loss. Clearly one who has suffered no injury nor damage, nor whose rights have been in any wise invaded, nor who has suffered any interference in his easement, nor who has alleged nor is able to establish that the maintenance of a mortuary impairs the beauty and value of his lot, nor the convenience of ingress to or egress from it, has ground to complain of another, or to enjoin another's acts.

In paragraph 1 of the complaint it is alleged that C. R. Vesper is a resident of the county of Los Angeles. Paragraph 2 alleges the corporate capacity of the various defendants. As to the principal defendant, Forest Lawn Memorial-Park Association, Inc., it is alleged that it was organized under the laws of the state of California as a nonprofit organization with no capital stock. In paragraph 3 is an allegation that Forest Lawn Cemetery Association holds title to the cemetery lots, which includes the lot of plaintiff, in which interment rights have been conveyed to the purchasers, subject only to certain rights of such purchasers. Paragraph 4 alleges that in 1918 the American Security & Fidelity Company executed and delivered to plaintiff a deed to a certain cemetery lot which was made with the consent of Forest Lawn Cemetery Association. In paragraph 5 it is alleged that in March, 1932, defendants Forest Lawn Company and Forest Lawn Memorial-Park Association, Inc., filed for record a map of Forest Lawn Memorial-Park together with a certificate of dedication whereby it dedicated said lands to private cemetery purposes. That in December, 1932, Forest Lawn Company entered into an agreement with Forest Lawn Memorial-Park Association, Inc., wherein lessor agreed to build a three-story building to be used exclusively as a funeral directors' establishment by lessee. It is further alleged that Forest Lawn Memorial-Park Association, Inc., had obtained from the state board of embalmers and funeral directors a license to operate a funeral directing business, and has begun such business of a funeral director in such building, which is situated within the outer boundaries of Forest Lawn Memorial-Park,

and will continue so to do until restrained by order of court. Paragraph 6 alleges that plaintiff has requested defendants and each of them to refrain from constructing or operating such undertaking or embalming establishment within the boundaries of Forest Lawn Cemetery, but defendants have refused, and plaintiff now seeks an order enjoining defendants from operating and conducting an undertaking business within Forest Lawn Memorial-Park.

From these allegations, it will be seen that plaintiff has failed to state facts justifying the relief sought. In High on Injunctions, § 790, the rule is thus expressed: "Nor will an injunction be continued against the erection of a structure where the facts do not satisfactorily show a probable or irreparable injury to the complainant." This rule is adopted in Orcutt v. Pasadena Land, etc., Co., 152 Cal. 599, 93 P. 497; Galbreath v. Hopkins, 159 Cal. 297, 113 P. 174. In Lorenz v. Waldron, 96 Cal. 243, 31 P. 54, 56, the court said: "A mere possibility or anything short of a reasonable probability, of injury, is insufficient to warrant an injunction against any proposed use of property by its owner." (Citing numerous cases.)

[3] In Clough v. Healy Co., 53 Cal. App. 397, 200 P. 378, 379, an injunction was refused, the court there saying: "The right must be clear, and an injunction of the character here in question will be denied when the obstruction does not constitute a material interference with the right of the owner of the easement, or where the damage sustained by him is merely nominal." Moreover, the issuance of an injunction is not a matter of right, but reposes in the discretion of the court. Sturgeon v. City of Hawthorne, 106 Cal. App. 352, 289 P. 229; Willis v. Lauridson, 161 Cal. 106, 118 P. 530, and, in the exercise of its discretion, a court will be guided by the general rule of convenience, that is, will consider whether a greater injury will result to the respondent from granting it than would be caused to the appellant in refusing. Santa Cruz Fair Building Association v. Grant, 104 Cal. 306, 37 P. 1034; Williams v. Los Angeles R. Co., 150 Cal. 592, 596, 89 P. 330. The application of this rule will be found also applied in the case of Hess v. Country Club Park, 213 Cal. 613, 614, 2 P.(2d) 782.

[4] Appellant conceded that his complaint does not contain an allegation to the effect he has suffered measurable pecuniary damages, but contends that he has a vested right in the cemetery and to the uses to which it may be put, which right has been invaded, and by reason of that fact alone he is entitled to injunctive relief.

In support of such rule he first cites Walker v. Haslett, 44 Cal.App. 394, 186 P. 622, 623. This was an action to enjoin the violation of a restriction in a deed to defendant, wherein defendant violated the agreement by erecting a double or two-family house. It is true that in such cases injury to the plaintiff need not be shown, but the reason for this special exception is thus given in Walker v. Haslett, supra, which reasons make it inapplicable to the instant case:

"When clearly expressed, covenants of this description will be strictly enforced, and a court of equity will decree an injunction, and this without any showing of actual damage or substantial injury. The reason why no actual damage or substantial injury need be shown is that the owner of the land, when selling it to another, may insist on just such covenants as he pleases touching its use or mode of enjoyment. He has the right to define the injury for himself, and also for his grantees of the remaining lots in his tract, where he is subdividing a whole tract into lots and selling them pursuant to a general plan of improvement or development, and the purchaser of any lot contracting with him must abide by his definition of what shall be deemed to be an injury to the balance of the land. He, or any subsequent owner of any part of the remaining land for the benefit of which the restrictive covenant is made, may enforce the covenant when it is broken, and is not to be defeated by the opinion of any number of persons that the breach occasions no substantial injury." (Citing cases.)

Appellant cites Hornblower v. Masonic Cemetery Ass'n, 191 Cal. 83, 214 P. 978, 981. That case, while stating that the courts differ as to how they shall define the interest conveyed in a cemetery lot, holds that a majority of the courts agree that the conveyance does not pass any title but merely an interest, and that the fee remains in the grantor, subject to the right of the grantee to the exclusive use thereof for burial purposes and finally held "* * * appellant had a right, cognizable in equity, to the continued and undisturbed use of his cemetery lot." There the as-

sociation threatened to abandon the entire cemetery and remove all bodies therefrom, manifestly constituting a direct injury to plaintiff. Here plaintiff does not contend that he has been disturbed in the use of his lot.

In Polhemus v. Daly (Mo.App.) 296 S.W. 442, defendant was entering the cemetery, dedicated to a public use, with a horse and dragging a sled over the graves, and removing sod for the purposes of sale, thereby causing the identity of the graves to be obliterated. Such act constituted a desecration to all the graves, and defendant was therefore enjoined. In Cochran v. Hill (Tex.Civ.App.) 255 S.W. 768, defendants were enjoined from pasturing live stock in the cemetery and from drilling oil wells therein and from interfering with complainant's access to the land.

In Certia v. University of Notre Dame Du Lac, 82 Ind.App. 542, 141 N.E. 318, 320, plaintiff sought to enjoin burials in the walks and paths in a distant part of the cemetery, and to cause the removal of the bodies already buried there. The court there held:

"* * * each [lot owner or plaintiff] had a right to protect from invasion the particular lot owned by him, as well as the right of ingress and egress thereto. But, while it may be conceded that any one of the owners of such cemetery lots had a right to protect his property from invasion, and to maintain his right of access thereto, it does not follow that he may assert such right with reference to some other lot in which he has no property interest in another section of the cemetery and remote from his own. * * *

"It stands to reason under the averments of the complaint that appellant only has interest in the walk, path, or driveway giving ingress and egress to his own lot."

[5] Here, also, the court had the right to consider the laches of plaintiff, which would be a circumstance to be considered in passing upon the injunction. From the complaint, it appears that in 1932 a lease was entered into whereby lessor agreed to build a structure to be used exclusively as a funeral directing establishment, which building was completed in May, 1933. This complaint was not filed until almost two years after the lease and more than a year after the business of a funeral director was instituted. In Los Angeles Athletic Club v. City of Long Beach, 128 Cal.App. 427, 17 P.(2d) 1061, plaintiff sued for an injunction. The evidence there showed that the plaintiff had waited nearly six months before seeking relief, but during that time defendant had expended considerable sums in constructing the alleged illegal breakwater. The court there held that because of such a delay of six months, plaintiff was guilty of laches, and so was not entitled to an injunction. Here appellant stood by while defendant constructed and occupied a large building to carry on the business of a funeral director, and for a considerable period made no complaint while said business was being operated. He cannot, after having passively permitted the defendants to spend money and effort, now prevent defendants from carrying on said business by injunctive relief. This rule finds support in the cases of Gurnsey v. Northern California Power Co., 160 Cal. 699, 117 P. 906, 36 L.R.A.(N.S.) 185; County of Los Angeles v. Rindge Co., 69 Cal.App. 72, 230 P. 468; Miller & Lux, Inc., v. Enterprise Canal & Land Co., 169 Cal. 415, 147 P. 567.

Appellant denies that his complaint is barred by laches because the relief sought does not contemplate the destruction of the building, but merely seeks to prevent an unauthorized use thereof. We can almost take judicial notice of the fact, however, that a three-story building erected and specially designed as a funeral directing establishment situated where this structure is could find only a very limited use for any purpose other than for which it was erected, and to deprive respondents of the particular use for which it was constructed is akin to its physical destruction. It is true as argued by appellant that to establish laches, something more than mere delay must be shown, but here we do find more; we find respondents expending large sums of money in equipping the building and the carrying on of long and expensive litigation concerning the mortuary.

In Williams v. Blue Bird Laundry Co., 85 Cal.App. 388, 259 P. 484, the action was to enjoin a public nuisance. In such a case lapse of time will not justify a special injury by a continuing nuisance; also it did not appear that the laundry had expended any money in its proposed development.

[6] In the instant case the operation of a mortuary is not a public nuisance (Dean v. Powell Undertaking Co., 55 Cal.

App. 545, 203 P. 1015), and as already pointed out, large sums have been expended thereon.

In St. Peter's Evangelical Lutheran Church v. Kleinfelter, 96 Pa.Super. 146, cited by appellant, the action was to restrain defendants from going upon a burial ground which was completely filled with graves and removing fences and tombstones, building a blacksmith shop over some of the graves, and using part of the cemetery to corral horses and cattle. The action was to restrain the use of the property in any manner whatsoever except as a burial ground, and to require the removal of all buildings or other structures inconsistent therewith, and held it would be inequitable to apply the doctrine of laches in an action to restrain the desecration of a burial ground.

[7] Appellant further contends that if this complaint is barred by laches he should be given the right to amend by showing that a test case was pending. However, an amended complaint has already been submitted which fails to allege any such defense, and, furthermore, even if such was the case, it would not toll the statute of limitations or excuse his delay. We believe both the complaint and the proposed amended complaint show that the trial court would have been justified in finding the action barred by laches.

Turning to the proposed amended complaint, set up in four separate causes of action, we find that in paragraph 3 of the first cause of action the interrelation of the various respondent corporations is set out in greater detail than in the original complaint.

[8] The second count of the proposed amended complaint sets up a cause of action arising from an allegation of a violation of a common-law dedication of property for a cemetery. In paragraph 9 of that count plaintiff alleges that he was defrauded in the buying of a burial lot by reason of certain advertisements or representations of defendants that the entire Forest Lawn Memorial-Park was to be devoted to cemetery purposes. There is, however, no allegation of damage to plaintiff, and the reasons given in support of the demurrer to the original complaint are applicable here to show that the second count of the proposed amended complaint fails to state a cause of action.

The third count of the proposed amended complaint attempts to set forth a cause of action of estoppel and alleges that the plaintiff was induced to purchase his lot by reason of false representations. Paragraph 2 of the third count alleges that plaintiff acquired his lot in 1918 from the American Security & Fidelity Company, but this corporation is not made a party to the action, and apparently plaintiff is attempting in this proposed amended complaint to sue corporations which were not incorporated until several years after the purchase of the property by plaintiff.

[9, 10] The fourth count of the proposed amended complaint attempts to set up a cause of action based upon the alleged violation of the constitutional rights of plaintiff. In this cause of action it is alleged that the Legislature, in 1931, enacted the General Cemetery Act of the state of California, and that said act, if interpreted, to mean that under its terms, an undertaking and funeral directing establishment may be conducted on premises dedicated for cemetery purposes, then said act of the Legislature would be in violation of the rights of plaintiff and deprives plaintiff of substantial property rights in violation of the Fourteenth Amendment of the United States Constitution, and in violation also of section 13 of article 1 of the Constitution of the state of California. The answer to this attempted cause of action is that plaintiff is attempting to anticipate a future condition, but in order to state a cause of action the same must exist at the time the complaint is filed, and not when something in the future might come to pass.

[11-14] Under the facts here existing, "due process of law" is available to the plaintiff by quo warranto. Appellant therefore, being able to obtain from the courts a fair hearing and an impartial determination of his rights, cannot here contend that he has suffered a denial of "due process of law." It has been repeatedly determined that if there be an opportunity to be heard some time during the proceedings, the constitutional guarantee of due process is not denied. Furthermore appellant cannot claim that he is denied "the equal protection of the laws" for the General Cemetery Act is a statute which applies to each member of a general class of plot owners in cemeteries in California. Appellant is in no different position than any other plot owner, and as long as the statute

applies impartially to every member of the general class, no member of that class can charge that it deprives him of equal protection of the laws so long as the conduct of the Legislature in creating a general class is reasonable. Tinsley v. Anderson, 171 U.S. 101, 106, 18 S.Ct. 805, 43 L.Ed. 91; Field v. Barber Asphalt Paving Co., 194 U.S. 618, 621, 24 S.Ct. 784, 48 L.Ed. 1142.

Plaintiff himself states that his proposed amended complaint, in addition to containing a more elaborate statement of his original cause of action, predicated upon a statutory dedication of the cemetery lands to cemetery purposes exclusively, contains three additional counts centering around the alleged unlawful erection of a mortuary upon the dedicated area, and contains no new matter except to detail the corporate history and set-up of the three defendants and alleging certain representations made in connection with the sale of the lot in question and in the operation and maintenance of the cemetery in general. Nowhere, however, does plaintiff claim to have set forth any damage to himself, present or prospective, by reason of the erection or operation of a mortuary or undertaking establishment within the exterior boundaries of Forest Lawn.

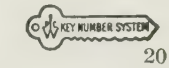
[15] The privilege of amending a complaint after demurrer is sustained rests in the sound discretion of the trial court. Whyte v. City of Sacramento, 65 Cal.App. 534, 224 P. 1008; Buckley v. Howe, 86 Cal. 596, 25 P. 132; Hansen v. Carr, 73 Cal.App. 511, 238 P. 1048.

In Fetterley v. Gibson, 210 Cal. 282, 291 P. 411, 412, the court said: "The allowance or refusal of amendments is a matter so largely within the sound discretion of the trial court that its exercise will not be disturbed in the absence of a showing of gross abuse."

[16] Another contention made by appellant is that Forest Lawn Company, the owner of the land occupied by the cemetery, was without power to lease a portion of its dedicated lands to Forest Lawn Memorial-Park Association, Inc., for the operation of a mortuary. But that is a question beyond the right of appellant to raise, for questions concerning the exercise of corporate powers cannot be raised collaterally by a third person, but by the state in quo warranto proceedings. McCann v. Children's Home Society, 176 Cal. 359, 168 P. 355; People v. California Protective Corp., 76 Cal.App. 354, 244 P. 1089; Ballentine, Manuel of Corporation Law and Practice (1930) §§ 86, 86a, and 86b.

We do not believe the meaning or effect of the General Cemetery Act is properly before us and we refrain from considering its provisions. We do, however, find the complaint fails to state a cause of action for injunctive relief and that the trial court did not err in refusing to allow plaintiff to file its proposed amended complaint, and the judgment is therefore affirmed.

We concur: THOMPSON, J.; PLUMMER, J.



20 Cal.App.2d 514

In re DE MARS' ESTATE.

Appeal of KABISIUS et al.

Civ. 10498.

District Court of Appeal, First District, Division 2, California.

April 24, 1937.

As Modified May 19, 1937.

Rehearing Denied May 24, 1937.

Hearing Denied by Supreme Court June 21, 1937.

1. Charities ⇐31

Question whether testatrix intended to create a charitable trust was a mixed question of law and fact for probate court.

2. Charities ⇐31

Intention of testatrix to create trust was clear where residuary clause of holographic will read that "any amount left go to the poor soldiers in Letterman Hospital," and where testatrix had been a member of the relief organization actively engaged in aiding soldiers of such hospital.

3. Charities ⇐18

Where owner of property bequeaths it for charitable purposes, charitable trust will be created, though no trustee is named and no language used indicating that property is to be held in trust, and court will appoint trustee.

4. Charities ⇐20(1)

Executor of will, where testator manifests such intention, will be permitted to act as trustee of charitable trust.

5. Charities ⇐10

Charitable trust is created where testator directs that certain sum shall be used to aid needy students, or to assist poor, or to promote religion.

6. Charities ⇐22(1)

Where testator bequeaths certain sum "to charity," charitable trust is created, since it is not essential to validity of charitable trust that charitable purpose should be specifically designated.

7. Charities ⇐10

Bequests to be used to aid needy students, or to assist poor, or to promote religion, are gifts to charitable object definitely indicated and not gifts to charity generally.

8. Wills ⇐439

Intentions of will are to be given effect and enforced where legal.

9. Charities ⇐21(3)

Where residuary clause of holographic will read that "any amount left to go to the poor soldiers, Letterman Hospital" and testatrix had been a member of a relief organization actively engaged in aiding soldiers at such hospital, charitable trust was created to be used for benefit of such poor soldiers in hospital as officials in charge should determine in need of assistance, and bequest was to that class of charitable patients, and to that class only.

10. Charities ⇐23

Failure to designate duties of trustee of charitable trust and method of his selection of beneficiary does not affect validity of trust.

11. Charities ⇐31

Gift to charitable uses are highly favored and will be most liberally construed to accomplish intent of donor, and trust for such purposes may be established and carried into effect where, if not of charitable nature, they could not be supported.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Proceeding in the matter of the estate of Catherine De Mars, deceased. From the portion of the decree finding that Catherine De Mars intended to establish charitable trust, Annie M. Kabisius and others, as heirs at law of Catherine De Mars, opposed by Colonel Roger Brooke, trustee, appeal.

Affirmed.

Frank S. Roderick and Louis B. De Avila, both of Oakland, for appellants.

C. B. Mickelwait and Raymond T. Donohue, both of San Francisco, for respondent.

NOURSE, Presiding Justice.

Catherine De Mars died leaving an holographic will in which the residuary clause read, "Any amount left go to the poor solders Leterman Hosital." After a full hearing the probate court found that the testatrix intended the residue to go in trust for the poor soldiers of the Letterman General Hospital, in San Franciso, and ordered distribution thereof to the commanding officer of the hospital, as trustee. The heirs at law appeal from this portion of the decree, and the single question involved is whether this bequest created a valid charitable trust.

We start with the finding of the probate court that the bequest referred to the Letterman General Hospital, an institution maintained by the Federal Government in San Franciso for the treatment and benefit of soldiers, and that many of these were poor and unable to provide themselves with the necessities of life. It is in evidence that the testatrix had been a member of a relief organization actively engaged in aiding these soldiers. We next have the concession of appellants that, if a valid charitable trust has been created by the will, it will not fail because no trustee was named in the will.

[1-6] The validity of the bequest as a charitable trust is attacked upon the grounds that the will did not declare in certain language that a trust was intended, that the beneficiaries are unnamed, and that the duties of the trustees are indefinite. The question of the intention of the testatrix is a mixed question of law and fact which the probate court determined adversely to appellants. Viewing the evidence and the surrounding circumstances, we must hold that the intention of the testatrix to create a trust is clear. The rule applicable is found in Restatement of the Law of Trusts, § 397f, which reads: "If the owner of property devises or bequeaths it for charitable purposes and not only does not name a trustee but also does not use language indicating that the property is to be held upon trust, nevertheless a charitable trust will be created. In such a case the court will appoint a trustee to administer the

trust. The executor of the will will be permitted to act as trustee if the testator manifested an intention that he should so act. Thus, if a testator directs that a certain sum shall be used to aid needy students, or to assist the poor or to promote religion, a charitable trust is created. It is not essential to the validity of the charitable trust that the charitable purpose should be specifically designated. Thus, if a testator bequeaths a certain sum 'to charity' a charitable trust is created."

[7] Authorities might be multiplied supporting the text that a bequest to be used "to aid needy students, or to assist the poor or to promote religion" creates a charitable trust though the individual beneficiaries are not named. See Bogert, Trusts and Trustees, p. 1143; Klumpert v. Vrieland, 142 Iowa, 434, 121 N.W. 34; Attorney General v. Goodell, 180 Mass. 538, 62 N.E. 962; Howard v. American Peace Soc., 49 Me. 288, 305; Heuser v. Harris, 42 Ill. 425, 437; Hood v. Dorer, 107 Wis. 149, 82 N.W. 546, 548; State v. Gerard, 37 N.C. 210, 220. Gifts of this character are held to be "gifts to a charitable object definitely indicated" (White v. Mayor, etc., of City of Newark, 89 N.J.Eq. 5, 103 A. 1042), and not gifts to charity generally. As such they are charitable gifts to a specified class of beneficiaries, and it is often a primary requisite determining the charitable nature of the class that the beneficiaries be uncertain and indefinite.

[8, 9] We are not unmindful that many cases have been cited by appellants rejecting bequests of this character, generally upon the ground that the bequest was a gift to charity generally and hence too indefinite to create a trust. But we are controlled by the well-accepted and liberal view in this state that the intentions of a will are to be given effect and enforced where legal. We have no difficulty in holding that the testatrix intended her gift to be used for the benefit of such poor soldiers in the hospital as the officials in charge should determine in need of assistance, and that the bequest was to that class of charitable patients, and to that class only.

[10, 11] The failure to designate the duties of the trustee and the method of his selection of beneficiaries does not affect the validity of the trust. The rule of liberal construction of gifts to charity is stated in 26 R.C.L. p. 1252, as follows: "It is now fully recognized that gifts to charitable uses are to be highly favored, and will be most liberally construed in order to accomplish the intent of the donor, and trusts for such purposes may be established and carried into effect where, if not of a charitable nature, they could not be supported." This rule has been followed consistently in this state. Collier v. Lindley, 203 Cal. 641, 266 P. 526; In re Estate of McDole, 215 Cal. 328, 10 P.(2d) 75. The appellants do not question the power of the probate court to apply these equitable principles to the interpretation of the bequest before us. A liberal construction requires the conclusion that the testatrix intended the trustee to use his discretion in the use of the fund for the benefit of these soldiers just as she intended that the Roman Catholic Archbishop should use his discretion in the use of the separate funds left to the St. Patrick, the St. Anthony, and the St. Elizabeth churches, and that the trustees of the Little Sisters of the Poor should use the land devised to them.

The portion of the decree appealed from is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



20 Cal.App.2d 456

BLANK et al. v. OLCOVICH SHOE CORPORATION et al. (two cases).

Civ. 11069, 11095.

District Court of Appeal, Second District, Division 1, California.

April 21, 1937.

Rehearing Denied May 13, 1937.

1. Evidence ⇐597

Inference founded on fact legally proved may be sufficient in law to support finding.

2. Corporations ⇐580

Evidence of similarity of names and identity of directorates of defendant corporation and corporation selling stock to plaintiffs in action to recover money paid therefor, voluntary bankruptcy proceedings by latter corporation, sale of its assets, except leases, to defendant corporation, and latter's offer of stock therein to holders of bankrupt corporation's stock at nominal value, *held* sufficient to support court's finding that defendant corporation succeeded bankrupt

corporation, assumed all its duties and liabilities, and became identical therewith.

3. Corporations ⇐577

Corporation cannot escape liability for its debts by mere change of name or shift of its assets to new corporation which is really mere continuation of old corporation, especially when actual fraud appears or creditors' rights are involved.

4. Corporations ⇐579(2)
Licenses ⇐39

New corporation, which was really mere continuation of old corporation, assets of which were purchased by new corporation at bankruptcy sale, *held* liable to purchasers of old corporation's stock, sold in violation of terms of permit granted by corporation commissioner, for amount paid therefor, whether old corporation's liability therefor attached and debt accrued ab initio at time of sale or some act by purchaser in nature of demand was necessary to mature debt and fix liability.

5. Corporations ⇐579(2)
Licenses ⇐39

Shoe company's sale of employees' stock to manager of retail store, conducted by him and company as partners, for amount for which he agreed to sell his partnership interest to company, without first offering such stock for sale to its employees, in violation of corporation commissioner's permit, *held* void, so as to authorize recovery of such amount by purchaser from such company's corporate successor; such stock not being sold for cash within Corporate Security Act (St.1917, p. 673, as amended).

6. Appeal and error ⇐931(1)

Appellate tribunal will assume that trial judge's findings are supported by evidence and his conclusions of law in accord with findings, in absence of contrary showing.

7. Licenses ⇐39

Purchasers of stock, sold by corporation in violation of terms of corporation commissioner's permit, *held* entitled to recover interest on amount paid therefor only from date of their rescission of purchase.

HOUSER, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Martin Blank and others against the Olcovich Shoe Corporation and others. From the judgment rendered, plaintiffs and named defendant appeal.

Affirmed.

Desser & Bokofsky and David I. Lippert, all of Los Angeles, for appellants and respondents Martin Blank, Minette Blank, and Albert Meister.

George Appell and Harry A. Mock, both of Los Angeles, for appellant and respondent Olcovich Shoe Corporation.

DORAN, Justice.

This action for money had and received is predicated upon the proposition that 746 shares of the common stock of the Olcovich Shoe Company, of the value of $7,460, had been sold to plaintiffs without a permit having been obtained therefor by said the Olcovich Shoe Company, and that 254 shares of the common stock (of the same company) of the value of $2,540, had been sold by said corporation to plaintiffs for said sum in violation of certain terms of the permit of the commissioner of corporations.

It appears from the record that Emil Olcovich was the founder of the corporation bearing his name, and for many years prior to the litigation herein, he and his brother, Albert Olcovich, were engaged in the wholesale and retail shoe business in southern California. The plaintiffs, Martin Blank and Minette Blank, are husband and wife; Mrs. Blank and plaintiff Albert Meister, who are brother and sister, are also nephew and niece of Emil and Albert Olcovich.

Before the commencement of this litigation, Blank and Meister were employees of the Olcovich corporations and Meister was a stockholder in the Olcovich Shoe Company. Blank's employment commenced in 1925. During the year 1927, Blank and the Olcovich Shoe Company conducted, as partners, a retail store in Los Angeles, known as Blank's Booterie. Blank was the store manager at a salary of $50 per week, said sum being paid from the partnership funds. While the partnership arrangement just referred to was in force, plaintiffs, being desirous of becoming stockholders in the Olcovich Shoe Company, agreed with either Emil or Albert Olcovich to purchase 1,000 shares of the common capital stock of the company for $10,000; payment therefor was to be as follows: That Blank would sell to the corporation his partnership interest in Blank's Booterie for $2,540, and receive credit for that sum

on the purchase price of said 1,000 shares of common stock of $10,000, and the sum of $7,460 should be paid in cash to said company. This agreement was effectuated, and two certificates of stock for 500 shares each were issued; one to Martin and Minette Blank and one to Albert Meister.

It was arranged that Blank should subscribe for 254 shares of what was designated "Employees' Stock." The other 746 shares were made up of a block of stock that theretofore had been sold to the corporation by one of its stockholders. The cash payment was made as agreed. Blank and Meister continued in the employ of the Olcovich Shoe Company thereafter.

In December, 1931, the Olcovich Shoe Company, at the instance of one of its creditors, was placed under the control of receivers in equity, and pursuant to an order of the United States District Court at Los Angeles, C. A. Wise and Emil Olcovich were named as receivers. Blank and Meister thereafter continued in the employ of the receivers. On August 12, 1932, the Olcovich Shoe Company filed a voluntary petition in bankruptcy, and on said date was adjudicated a bankrupt.

Before the adjudication in bankruptcy, however, a California corporation known as the Olco Shoe Company was organized. In the course of the bankruptcy proceedings the referee in bankruptcy gave notice of an intended sale of the assets of the bankrupt corporation—the Olcovich Shoe Company. At an open sale the assets of the Olcovich Shoe Company were purchased by the Olco Shoe Company under the terms of a certain offer which was accepted by the referee in bankruptcy and thereafter confirmed. The offer of purchase was, in part, as follows: "The undersigned, Olco Shoe Co., does hereby offer to purchase from you as Trustee in Bankruptcy of the Olcovich Shoe Co., all of the assets of the Olcovich Shoe Co. and of the estate of the Olcovich Shoe Co. in bankruptcy, including all merchandise, furniture, fixtures and equipment, accounts receivable, automobiles, trucks, choses in action, debts due by other parties to the Olcovich Shoe Co., including claims of any kind or nature, liquidated or unliquidated, cash on hand, stocks, bonds and all other assets of every name and nature, excepting leases and leasehold interests in real estate, for the consideration hereinafter stated and upon the terms and conditions set forth."

About January, 1933, upon the completion of the reorganization, plaintiffs accepted an offer of the Olco Shoe Company to purchase shares thereof in proportion to the number of shares they theretofore had owned in the Olcovich Shoe Company.

Thereafter, on October 26, 1934, plaintiffs Martin Blank and Minette Blank served notice of rescission on defendants of the purchase of the original 500 shares of the common stock of the Olcovich Shoe Company, basing the rescission on the grounds that said company had not applied for or secured from the commissioner of corporations permission or authority to issue or sell said stock and that for said reason said sale was void. On December 31, 1934, plaintiff Meister served a similar notice based on the same grounds with reference to the 500 shares held by him. It should be noted here that the sale of this stock took place in June, 1929, and the action herein was commenced in June, 1935. Before the litigation herein was commenced the name of the Olco Shoe Company was changed to the Olcovich Shoe Corporation.

The court found in substance that the sale of the 254 shares of "Employees' Stock" was void, as the terms of a certain supplemental permit to sell said stock were not complied with by said the Olcovich Shoe Company, in that no offer to sell said stock had theretofore been made by said corporation to its employees before the sale thereof to plaintiffs, and that plaintiffs were not employees of said the Olcovich Shoe Company at the time of said sale; but the court further found that the sale of said 746 shares was in compliance with the permit issued by the corporation commissioner and was valid. In addition, a finding was made (finding No. III), "That said The Olcovich Shoe Corporation succeeded, acquired all the rights and assets of, and assumed all the duties and liabilities of, the said The Olcovich Shoe Company, except its leases, and in all respects became, and at all of the times has been, identical with the said The Olcovich Shoe Company."

The court held against defendants with respect to several special defenses interposed, one of which was the statute of limitations, and rendered judgment in favor of plaintiffs Martin Blank and Minette Blank in the sum of $2,791.85. The court further decreed that as between the defendants and plaintiff Albert Meister, plaintiff Albert Meister take nothing.

The plaintiffs, and defendant, the Olcovich Shoe Corporation, appeal from the judgment.

Plaintiffs, as appellants, assert three specifications of error, namely, (1) that the court erred in concluding that the sale of the 746 shares was made in conformity to the permit of the commissioner of corporations; (2) in concluding that plaintiffs were not entitled to judgment against Emil and Albert Olcovich personally; and (3) that plaintiffs were entitled to interest from the date of rescission only, rather than from the date of the sale of said stock.

Defendant, the Olcovich Shoe Corporation, as appellant, contends that the court erred in its conclusion that said the Olcovich Shoe Corporation was the successor to the Olcovich Shoe Company, and as such was responsible in damages for the acts of its predecessor for the alleged sale of stock in violation of a permit of the corporation commissioner; that the finding above quoted, to wit, "That said The Olcovich Shoe Corporation succeeded, acquired all the rights and assets of, and assumed all the duties and liabilities of, the said The Olcovich Shoe Company, except its leases, and in all respects became, and at all of the times has been, identical with the said The Olcovich Shoe Company" is not supported by the law and the evidence. It is contended, further, that finding of fact No. IV, to the effect that said "Employees' Stock" was not sold for cash and was sold without first having been offered for sale to the employees, in violation of the permit of the corporation commissioner, is not supported by the evidence.

[1-4] In reply to the contention of appellant, the Olcovich Shoe Corporation, that there is no evidence in the record to support finding No. III, respondents Blank and Meister argue that such evidence is to be found in the form of an inference based upon several circumstances, namely, the similarity of names, the identity of the directorate, the bankruptcy proceedings followed by the purchase and sale of the assets, except its leases, of the one corporation by the other, and the offer of stock in the new corporation to the stockholders of the old at a nominal value. That an inference founded on a fact legally proved may be sufficient in law to support a finding, there can be no question, and it cannot be said that the evidence is insufficient to support the finding in this regard. With reference to the question of liability, there is an abundance of authority to support the claim that under certain circumstances corporations cannot escape liability by a mere change of name or a shift of assets when and where it is shown that the new corporation is, in reality, but a continuation of the old. Especially is this well settled when actual fraud or the rights of creditors are involved, under which circumstances the courts uniformly hold the new corporation liable for the debts of the former corporation. Stanford Hotel Co. v. M. Schwind Co., 180 Cal. 348, 181 P. 780; Strahm v. Fraser, 32 Cal.App. 447, 163 P. 680. It should be noted that these authorities and many others to the same effect defended the rights of actual creditors. The plaintiffs, appellants in the instant case, at all times until the notice of rescission was served, were merely possible, potential, contingent, or quasi creditors. Their position, in this respect, so far as the new or the old corporation was concerned, was conditional; that is to say, whether they would be creditors depended entirely upon their election to become such. But whether the liability of the old corporation attached and the debt accrued ab initio at the time of the alleged illegal sale of stock or whether some act by the purchaser in the nature of a demand was necessary to complete a process that would mature the debt and fix the liability, is of no consequence, for the authorities appear uniform on the proposition that under the circumstances presented by the record herein, the new corporation, when found to be but a continuation of the old, is liable regardless of any distinction as to the character of the creditors or the nature of the debt.

[5] The weight of authority, holding otherwise, refutes the claim of appellant, the Olcovich Shoe Corporation, that the so-called "Employees' Stock" was sold for cash within the meaning of the Corporate Security Act (St.1917, p. 673, as amended). The courts have hitherto declared with respect to this subject that corporate stock " * * * is required to be issued and disposed of in strict conformity with the permit granted for that purpose by the corporation commissioner." Parrish v. American Ry. Emp. Pub. Corp., 83 Cal.App. 298, 302, 256 P. 590, 591. To the same effect is the ruling in Domenigoni v. Imperial Live Stock, etc., Co., 189 Cal. 467, 209 P. 36, and Mannion v. Baldwin, 217 Cal. 600, 20 P.(2d) 678.

[6, 7] Plaintiffs, as appellants, rely upon the judgment roll and in effect simply urge that, with respect to the three specifications of error heretofore mentioned, the judgment of the trial court should have

been in accord with plaintiffs' contentions, and that plaintiffs, with regard to the issues therein involved, should have prevailed.

An appellate tribunal is in no position to review the mental processes of the trial judge, and will assume, in the absence of a showing to the contrary (which is the state of the record herein), that the findings are supported by the evidence and the conclusions of law are in accord with the findings. The trial court's conclusion that plaintiffs were entitled to interest only from the date of rescission is in accord with well-established law. Hayt v. Bentel, 164 Cal. 680, 130 P. 432; Hellman v. Merz, 112 Cal. 661, 44 P. 1079; Wilson v. Rigali & Veselich, 138 Cal.App. 760, 33 P.(2d) 455; Knight v. Bentel, 39 Cal.App. 502, 179 P. 406; Shirreffs v. Alta Canyada Corp., 8 Cal.App.(2d) 742, 48 P.(2d) 55; McDevitt v. Butte City Ranch, 7 Cal.App.(2d) 252, 46 P.(2d) 290.

The foregoing disposes of the questions involved in this appeal as recited in the opening briefs of the respective appellants.

The judgment in all respects appealed from is affirmed.

I concur: YORK, J.

I dissent: HOUSER, P. J.



20 Cal.App.2d 565

A. HAMBURGER & SONS, Inc., v. LEMBOECK et al.

Civ. S. C. 12.

District Court of Appeal, Second District, Division 1, California.

April 27, 1937.

1. Easements ⇐15

Trust deed of one of two adjoining parcels of land owned by mortgagors passed to beneficiary such easements in other parcel as were necessary for reasonable enjoyment of mortgaged parcel (Civ.Code, § 1104).

2. Easements ⇐15

Trust deed conveys easement as effectively as grant deed.

3. Easements ⇐61(12)

Judgment limiting easements of beneficiary under trust deed on one of two adjoining parcels of land owned by mortgagors in other parcel to area actually occupied by encroachments appurtenant to apartment house on mortgaged parcel, thereby denying right of way thereto over other parcel, *held* erroneous as in conflict with court's findings that such access was essential to use of stairway, door, and fire escape at rear of apartment house.

4. Easements ⇐61(9½)

Trial court's finding, in suit for recognition of easements in defendants' land adjoining plaintiff's land, that defendants did not have actual notice or knowledge of such easements before acquiring title to their land, *held* not broad enough to cover material issue, raised by complaint, as to constructive notice of easements (Civ.Code, §§ 18, 19).

5. Easements ⇐61(11)

Where rear yard space, required by Housing Act behind apartment house, is not available in land adjoining that on which building is located, as intended by persons owning both parcels at time of erecting it, except by cutting off substantial portion of rear thereof, if court determines that use of rear yard did not pass to beneficiary under trust deed of parcel on which located, latter's contention that equity can be done only by awarding owners of other parcel sufficient amount to compensate them for right given beneficiary to use such yard may be considered (St.1923, p. 795, § 14).

Appeal from Superior Court, Los Angeles County; Georgia P. Bullock, Judge.

Suit by A. Hamburger & Sons, Incorporated, against Carl Lemboeck and another, in which defendants filed a cross-complaint. From the judgment rendered, plaintiff appeals.

Reversed.

Mitchell, Silberberg & Knupp and Ross R. Hastings, all of Los Angeles, for appellant.

Fred W. Morrison and W. W. Butler, both of Los Angeles, for respondents.

DESMOND, Justice pro tem.

In this case the plaintiff, owner of a parcel of real estate fronting in a general southerly direction upon Exposition boule-

yard in the city of Los Angeles, sought to have the court recognize by its decree certain easements claimed to exist in and over another parcel, owned by the defendants, adjoining the plaintiff's land at the rear, and fronting upon Thirty-Seventh place. The court was asked to enjoin the defendants from maintaining upon their own land, this second parcel, a six-foot board fence which had been erected immediately adjacent to the holdings of the plaintiff. The court refused to enjoin the maintenance of this fence, but recognized as easements incidental and appurtenant to an apartment house which had been constructed upon the first parcel, the spaces occupied in the second parcel by a rear basement stairway, a sunken areaway for a basement window, a portion of a stoop or platform at the rear door of the apartment house, and a fire escape which overhung the second parcel at the rear of the building. The trial court quieted title in defendants under their cross-complaint as to their premises, except as to the easements mentioned, thereby denying to plaintiff corporation the benefit of certain additional burdens claimed by it as fixed upon defendants' land, including a way to and from the spaces occupied by stairway, stoop, and fire escape, and the right to use an unoccupied portion of defendants' rear yard wide enough to meet the requirements of the State Housing Act (St.1923, p. 781). Appellant claims that certain findings conflict, that others are not supported by the evidence, that the judgment does not conform to certain findings, and that the court has failed to find upon material issues raised by the pleadings.

We have mentioned two adjoining properties. A third parcel immediately adjoined these two upon the east, extending along Hoover street the entire distance between Exposition boulevard and Thirty-Seventh place. We shall refer to the three as parcels 1, 2, and 3, in the order in which they have been mentioned above. Max Neft and Paula, his wife, became the owners of all three parcels in the year 1924. In 1925 they completed upon parcel 1 the erection of a four-story brick apartment house. The rear line of parcel 1, 60 feet in length, was broken almost halfway across, measuring to the west, by a rectangular extension running 30 feet to the north. The easements are claimed on territory lying to the west of that extension and north of the main body of parcel 1. For an apartment house erected upon an interior lot, the State Housing Act requires that where the building does not exceed 48 feet in height, as here, there shall be provided a rear yard 11 feet wide immediately behind the apartment house, extending across the entire width of the lot. Housing Act, § 14 (St.1923, p. 795). Section 13 of the same act (St.1923, p. 795) provides that "on every interior lot on which an apartment house is hereafter erected, at least twenty-five per cent of such lot shall be left unoccupied." At the time the application for a permit to erect the apartment house was filed, the architect who designed the house submitted a plan, which appears as an exhibit in this case, showing the building as occupying practically all of parcel 1 except the northerly 30-foot extension and space for walks on either side of the building; also showing a vacant strip of land running across the lots (parcel 1 and a portion of parcel 2) in the rear of the apartment building, 13 feet 6 inches in width, except where the space is interrupted by the rear basement stairway, the stoop, and the basement window areaway.

Just before constructing the apartment house on parcel 1, Mr. and Mrs. Neft had erected a two-story flat building on parcel 2, fronting immediately upon Thirty-Seventh place. This left a clear space between the two buildings of approximately 35 feet. The westerly portion of the rear lot of parcel 2, however, had built upon it a two-car stucco garage, erected with the flat building, and it was necessary, contemplating the immediate construction of the apartment house, to put a jog in the easterly wall of that garage to permit the 13½-foot strip above mentioned to extend over the rear of parcel 2, to the full width of parcel 1. Difficulty arose in connection with the use of the open space between the two apartment buildings immediately after foreclosures took place under three trust deeds which Mr. and Mrs. Neft had executed. Plaintiff, beneficiary under a trust deed to Title Guarantee & Trust Company, dated March 15, 1927, attaching to parcel 1, acquired title thereto on September 8, 1933; defendants, beneficiaries upon a trust deed dated February 17, 1931, attaching to parcel 2, acquired their title on September 15, 1933. These same defendants also acquired title to parcel 3, under similar foreclosure proceedings, on October 3, 1933. On that date a demand was made upon plaintiff by defendants' attorney, to "take proper steps to remove

the portion of your building encroaching on Lot 4, so that it will not be necessary for me to take any action in connection therewith." "Lot 4" is the official description of the real estate which we have called parcel 2. When the plaintiff failed to remove the encroachments complained of, defendants built the six-foot board fence which has been mentioned approximately on the dividing line between the two properties, effectually barring any approach from the apartment house to any portion of parcel 2, but leaving the structural encroachments, stairway, stoop, and window areaway, in place, beyond the fence.

[1, 2] We are of the opinion that when Mr. and Mrs. Neft passed title to parcel 1 under the first trust deed, retaining ownership in parcel 2, that such easements as were necessary for the reasonable enjoyment of parcel 1 as then used passed with the deed. The rule is stated as follows in the syllabus of Cave v. Crafts, 53 Cal. 135: "When the owner of lands divides his property into two parts, granting away one of them, he is taken by implication to include in his grant all such easements in the remaining part as are necessary for the reasonable enjoyment of the part which he grants, in the form which it assumes at the time he transfers it. The purchaser is entitled to the benefit of the easement without any express grant or reservation." The court in that case relied upon the authority of Lampman v. Milks, 21 N.Y. 505, where the court states that the same principle is in effect whether the grantor be the owner of two tenements or of an entire estate of which he sells a portion. The same case quotes Phear on Waters, p. 73, as follows: "If the grantor has already treated this portion as a separate property, the mode in which he enjoyed it, or suffered it to be enjoyed, affords a very proper indication of what rights over his remaining land he intends to pass as accessory to it." See, also, Quinlan v. Noble, 75 Cal. 250, 17 P. 69; Rodemeyer v. Meger, 30 Cal.App. 514, 158 P. 1047. Section 1104 of the Civil Code reads as follows: "A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed." See, also, 9 Cal.Jur. 957; Grimmesey v. Kirtlan, 93 Cal.App. 658, 662, 270 P. 243. That a deed of trust conveys an easement as effectively as a grant deed seems clear under the reasoning of Pendola v. Ramm, 138 Cal. 517, 71 P. 624, and San Joaquin Valley Bank v. Dodge, 125 Cal. 77, 57 P. 687.

[3] While the trial court found that "no easements whatever over or upon Parcel Two were conveyed to said Title Guarantee and Trust Company, as Trustee or otherwise," it did decree that parcel 2 was subject, as to the apartment house, to the easements created by the encroachments we have mentioned. However, these easements were limited in each case to the area occupied by the structure, and nowhere in the judgment does the court establish the way claimed for convenient use of the stoop, stairway, or fire escape. The court, however, found specifically "that access over the southerly portion of Parcel Two, giving ingress to and egress from said stairway, has been at all times and is now necessary and essential, to the extent Parcel Two is occupied thereby, to the use of said stairway. That said stairway has been at all times since said apartment house was built and is now an incident of and appurtenant to said apartment house"; also, "that ingress to and egress from said door over that portion of Parcel Two occupied by said stoop has been at all times since said apartment house was built, and is now, necessary and essential to the use of said apartment house situated on Parcel One. That said stoop has been at all times since said apartment house was built, and is now, an incident of and appurtenant to said apartment house situated on Parcel One"; also, "that access to and from said fire-escape over a portion of Parcel Two has been at all times since said apartment house was built, and is now, necessary and essential to the use of said fire-escape. That said fire-escape, and such access, have been at all times since said apartment house was built, and are now, incidents of and appurtenant to said apartment house on Parcel One." We believe that the judgment, limiting, as it does, the easements to the area actually occupied by the encroachments, and thereby denying the right of access to them over parcel 2, that is, the right of way claimed by appellant, is not supported by the above-mentioned findings, being in conflict with them.

[4] Considering it as settled that all the easements necessary for the reason-

able enjoyment of parcel 1 attached to parcel 2 so long as Mr. and Mrs. Neft remained in possession of parcel 2, the present question is whether all such easements continued after title to parcel 2 passed to the respondents by foreclosure. The decision of this question, in our opinion, depends largely upon whether or not the respondents can be held to have had notice, either actual or constructive, of the existence of the easements. The complaint alleged, on information and belief, that even before the trust deed attaching to parcel 2 was executed, "prior to the 24th day of July, 1930 (which was the date of the trust deed to parcel three, executed earlier than the trust deed to parcel two), the defendants and each of them knew of all the uses of parcel two and parcel three for the benefit of, incident to and appurtenant to parcel one and said apartment house," etc. Upon this point the court found "that it is not true that, at any time prior to the 24th day of July, 1930, or at any time prior to the date when defendants Carl Lemboeck and Irene Lemboeck acquired title to parcel two, they, or either of them, *knew by having actual notice or knowledge thereof,* that any use or easement was claimed for the benefit of parcel one or said apartment house, upon, over or in parcels two and three, whether as incident to or appurtenant to parcel one or the apartment house thereon, or otherwise." (Italics ours.) The appellant claims that this finding is not broad enough to cover a material issue, pointing out that the Civil Code, section 18 thereof, defines "notice" as: "1. Actual—which consists in express information of a fact; or, 2. Constructive—which is imputed by law." Section 19 of the Civil Code provides: "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact." The Supreme Court, in Smith v. Industrial Acc. Comm., 174 Cal. 199, 162 P. 636, has said, "The word 'knowledge' may include that which is imputed." Since notice may be either actual or constructive, and since the complaint charged that the defendants, prior to the execution of the trust deed under which they finally acquired title to parcel 2, "knew of all the uses of parcel two and parcel three for the benefit of and incident to and appurtenant to parcel one and said apartment house," we believe the contention of appellant that the trial court failed to find upon a material issue should be upheld. In Prouty v. Devin, 118 Cal. 258, 50 P. 380, the question was which of two mortgages was entitled to priority, and the Supreme Court held that it was not sufficient for the trial court to find that the defendant had no actual knowledge of the existence of plaintiff's mortgage of earlier date, but that the question of constructive notice thereof should have been passed upon; that since there was an omission to find upon that point, a reversal was necessary. See, also, Davis v. Monte, 81 Cal.App. 164, 168, 169, 253 P. 352. We believe there was evidence to warrant a finding favorable to appellant on the question of imputed knowledge, at least as to the right of way over parcel 2 for convenient use of the recognized easements.

[5] Since, under our decision, a new trial will be necessary, we do not pass upon the many other objections raised by appellant. However, we believe it is proper to say this: Continued use of the building on parcel 1 as an apartment house requires a rear yard, as specified in the Housing Act. If that space is not available in parcel 2, as originally intended, the only way in which it can be secured is by cutting off a substantial portion of the rear of the present building, at large expense, thereby reducing the rental area of the building, as well as the value of the property. Under these circumstances, if the court, upon a retrial, should determine that the use of the rear yard did not pass as an easement, consideration can still be given to the proposition advanced here by appellant, namely, that in such a situation equity can be done only by making an award to the owners of parcel 2 of a sufficient amount to compensate them for a right given the owners of parcel 1 to use the rear yard in the manner and for the purposes claimed.

The judgment is reversed.

We concur: HOUSER, P. J.; YORK, J.

JACKSON et al. v. SUPERIOR COURT IN AND FOR SAN DIEGO COUNTY et al.*

Civ. 1864.

District Court of Appeal, Fourth District, California.

April 15, 1937.

Hearing Granted by Supreme Court June 14, 1937.

1. Prohibition ⇐3(5)

Writ to prohibit court from proceeding with trial of petitioners on an indictment to which they plead former jeopardy *held* to lie as against contention that remedy by appeal was speedy and adequate, where trial would take several weeks and preparation of the record and perfection of appeal would take several more, especially since issue raised by writ was jurisdiction of trial court to again place petitioners on trial for offenses charged in indictment.

2. Criminal law ⇐165, 183

A person is in legal "jeopardy" when he is put on trial, before a court of competent jurisdiction, on an indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance, and a jury is thus charged when it is impaneled and sworn, and a dismissal of the case thereafter without the consent of the defendant is equivalent to an acquittal and is a bar to a subsequent indictment for same offense.

[Ed. Note.—For other definitions of "Jeopardy," see Words & Phrases.]

3. Criminal law ⇐172

Where both prosecution and defense had exercised same number of peremptory challenges and court then directed a reversal of the statutory order of exercising, and later, names in the jury box having been exhausted, additional names of jurors who were on the panel but were serving in another department at opening of trial were put in, whereupon jury was completed before peremptories were exhausted and was sworn, defendants were placed in jeopardy, since such errors were not sufficiently substantial to cause a reversal of conviction if defendants were convicted (Pen.Code, §§ 1070, 1088, 1098).

4. Criminal law ⇐172

As respects claim of former jeopardy, in selection of jury for a trial under an indictment, error of court, without objection from defendant, in reversing the statutory order of exercise of peremptory challenges *held* waived by defendant in accepting the jury before his peremptory challenges were exhausted (Pen.Code §§ 1070, 1088, 1098).

5. Criminal law ⇐172

As respects claim of former jeopardy, where names in jury box were exhausted and additional names of jurors who were on panel but serving in another department at opening of trial were put in such error in selection of jury for a trial under an indictment *held* waived by defendants' counsel in suggesting and requesting the procedure, in view of rule that a defendant will not be permitted to lead a trial judge into unsubstantial error and then complain of it.

6. Criminal law ⇐183

Defendants on trial before court of competent jurisdiction on an indictment properly found and drawn before a jury legally impaneled and sworn *held* placed in jeopardy on jury being sworn, so that they could not be tried again for the same offense, following prosecutor's granted motion for a mistrial, which was opposed by defendants, who had waived the unsubstantial errors in selection of the jury on which the motion was based (Pen.Code, §§ 1070, 1088, 1098).

Petition for a writ of prohibition by Russell O. Jackson and Frank A. Scott against the Superior Court of the state of California in and for San Diego County, and Hon. Lloyd E. Griffin, as judge thereof.

Writ granted.

Hervey & Holt, of San Diego, for petitioners.

Thomas Whelan, Dist. Atty., Frank T. Dunn, Asst. Dist. Atty., and V. C. Winnek, Deputy Dist. Atty., all of San Diego, for respondents.

MARKS, Justice.

In this original proceeding petitioners seek a writ of prohibition prohibiting the respondent court and judge from proceeding with their trial under an indictment of the grand jury of San Diego county. Petitioners maintain they have once been placed in jeopardy for the several offenses charged in the indictment.

Respondents have both demurred to and answered the amended petition, and in the demurrer attack it on both special and general grounds, uncertainty, failure to state facts sufficient to constitute a cause of action, and lack of jurisdiction. The question of jurisdiction is not pressed. There can be no doubt that this court pos-

*For subsequent opinion see 74 P.2d 243.

sesses jurisdiction to entertain and decide a petition for a writ of prohibition.

Various instances of uncertainty are alleged. The amended petition has attached to it, and made a part of it by reference, a copy of those portions of the reporter's transcript material to this proceeding. This cures uncertainties appearing in the body of the amended petition, and also cures certain legal conclusions therein contained.

Respondents urge that the writ should not be issued because petitioners possess a plain, speedy, and adequate remedy at law whereby they may preserve the rights which they hope to protect in this proceeding. They maintain that the plea of former jeopardy is one which the petitioners may or may not enter, their action depending on themselves and their counsel; that if the trial court was in error in refusing their request to enter these pleas, and was in error in concluding that jeopardy had not attached, those questions might be raised on appeal if they should be convicted at their second trial, and would serve as a sure ground for reversal of the judgments which might be pronounced against them, which reversals would result in their discharge after the appeal had been decided. That the right to raise this question on appeal is plain cannot be doubted. That it is either speedy or adequate is open to serious question.

[1] It was admitted in argument that the trial will consume several weeks. With such a voluminous record to prepare, considerable time would necessarily elapse before the appeal could be perfected and decided. In view of the considerable discretion vested in us in issuing these writs, we are constrained to hold that while the remedy at law is plain it is neither speedy nor adequate under the facts before us and especially in view of the fact that in its final analysis the question before us is one of the jurisdiction of respondents to again place petitioners on trial for the offenses charged in the indictment found against them. Menjou v. Superior Court, 128 Cal.App. 117, 16 P.(2d) 1007; Huntington v. Superior Court, 5 Cal.App. 288, 90 P. 141; Oliver v. Superior Court, 92 Cal.App. 94, 267 P. 764.

It follows that the demurrer should be overruled and the cause considered on its merits. This will require that we set forth a somewhat detailed statement of the facts which are not in dispute.

Petitioners were indicted and charged with violations of the Corporate Securities Act (St.1917, p. 673, as amended). The legal sufficiency of the indictment and the jurisdiction of the trial court are not questioned.

Petitioners were placed on trial and the court proceeded to impanel a jury. When ten peremptory challenges had been used by each side, the trial judge required one of the defendants to exercise a peremptory before the people had used one. See sections 1088, 1070, 1098, Pen.Code. No formal objection to this procedure was made and for a time thereafter peremptory challenges were exercised in that order. Then counsel for defendants (petitioners here) informed the trial judge that he believed this procedure erroneous and stated that he would ask for an added number of peremptory challenges over those allowed by law (section 1098, Pen.Code) equal to the number he had used after the erroneous order of exercising such challenges had been enforced. No other objection was made at any time. The trial judge had no occasion to pass on this request because a satisfactory jury was obtained and sworn before either party had exhausted their peremptory challenges.

A second alleged error was committed while impaneling the jury. In San Diego county one jury panel is used for the several departments of the superior court. Part of this panel was in attendance in the department of the respondent judge and another part was serving in another department. Those jurors completed their services and returned to the department in which petitioners were on trial. Just at what stage of the proceedings this happened does not appear. When the names in the jury box had been exhausted, counsel for defendants (petitioners here) informed the trial judge that eleven jurors on the regular panel were sitting in the courtroom and requested that their names be placed in the jury box, which was done and the trial jury was completed and sworn.

At this stage in the proceedings the following occurred:

"Mr. Dunn (Assistant District Attorney): If your Honor please, in regard to the impanelment of the jury, we have investigated the law and we find that in our opinion, and I think Counsel will agree, that there probably was error committed which was prejudicial in the rulings made by the Court relative to the exercising of

the peremptory challenges. On behalf of the People and also on behalf of the defendants, for that reason we think the error committed is such that it would necessitate the Court in declaring this a mistrial.

"Mr. Hervey: If the Court please, we would want the record to show—are you moving for a mistrial at this time?

"Mr. Dunn: Yes.

"Mr. Hervey: Let the record show that the defendants resist the motion.

"The Court: Well, it appears that the Court made or possibly may have made some error in the question of exercising the peremptory challenges—

"Mr. Hervey: Before your Honor completes his statement, may I say for the record, that our position may be made clear —on behalf of Russell O. Jackson and on behalf of the defendant Frank A. Scott, we wish the record to show that the defendants are present in court prepared to proceed and object to a mistrial being declared."

The trial court granted the motion, declared a mistrial, discharged the jury, and continued the case to the following morning for retrial. Counsel for defendants (petitioners here) moved the trial court for permission to enter pleas of former jeopardy and former acquittal on behalf of both defendants (petitioners here). This motion was denied and this proceeding followed.

Former jeopardy is thus defined in 8 Ruling Case Law page 138:

[2] "A person is in legal jeopardy when he is put on trial, before a court of competent jurisdiction, on an indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance, and a jury is said to be thus charged when it is empaneled and sworn. The opinion prevails to some extent that jeopardy does not attach until a verdict is rendered. This doctrine, however, limits the term jeopardy to mean the same as autrefois acquit or convict. But the word means exposure to danger, and where a person is put on his trial on a charge of a crime before a jury sworn to decide the issue between the state and himself, he is then exposed to danger in that he is in peril of life or liberty. * * *

"Until the entire jury is selected and sworn jeopardy does not attach, so that a defendant is not entitled to discharge because of former jeopardy, if, on discovering the failure of one of the jurors to take the oath, the jury is resworn and the trial begun de novo. But as soon as a jury has been impaneled and sworn jeopardy attaches, and a dismissal of the case, when not authorized by law and without the consent of the defendant, after the jury has been sworn and the trial actually commenced is equivalent to an acquittal of the charge and will constitute former jeopardy on a subsequent trial on the same charge. The rule necessarily implies that the jury sworn shall be one properly constituted, and therefore a defendant is not in jeopardy where the jury selected and sworn is not a legal jury, as for instance where one of the jurors is an alien, and therefore the court may properly withdraw him and substitute a duly qualified person in his place."

The substance of this definition has been approved by the courts of California with the exception of the last sentence which has only been declared by way of dicta. See People v. Webb, 38 Cal. 467; People v. Cage, 48 Cal. 323, 17 Am.Rep. 436; People v. Hunckeler, 48 Cal. 331; People v. Curtis, 76 Cal. 57, 17 P. 941; People v. Ammerman, 118 Cal. 23, 50 P. 15; People v. Hawkins, 127 Cal. 372, 59 P. 697; People v. Stoll, 143 Cal. 689, 77 P. 818; People v. Tong, 155 Cal. 579, 102 P. 263, 24 L.R.A.(N.S.) 481, 132 Am.St.Rep. 110; People v. Nash, 15 Cal.App. 320, 114 P. 784; People v. Young, 100 Cal.App. 18, 279 P. 824, 826.

In People v. Hawkins, supra, it was said:

"It is well settled that the impaneling of the jury is part of a trial. Silcox v. Lang, 78 Cal. 118, 20 P. 297. The legal jeopardy of the defendant has attached when a jury has been 'charged with his deliverance,' and the jury stands thus charged when its members have been impaneled and sworn. Cooley, Const.Lim. (6th Ed.) p. 399."

The case of People v. Young, supra, is so factually similar to the instant case that it must be considered as controlling here. In that case a jury with two alternates were sworn. The district attorney made his opening statement to the jury. A juror reported that he was acquainted with a witness who was to be called for defendant. Over the objection of defendant the district attorney was permitted to exercise a peremptory challenge on this juror and one of the alternates was drawn and en-

tered the jury box. Defendant was refused leave to enter the plea of former jeopardy. He was convicted and in reversing the judgment and ordering his discharge the court said:

"Jeopardy signifies the danger of conviction and punishment which one charged with a criminal offense incurs when duly put upon trial before a court of competent jurisdiction, and a jury has been charged with his deliverance. People v. Tong, 155 Cal. 579, 102 P. 263, 24 L.R.A.(N.S.) 481, 132 Am.St.Rep. 110. A jury stands so charged when its members have been impaneled and sworn. People v. Hawkins, 127 Cal. 372, 59 P. 697. His jeopardy is real, and he cannot be again subjected to jeopardy unless the jury be discharged without rendering a verdict, by his consent, or upon some legal necessity resulting from physical causes beyond the control of the court. People v. Hunckeler, 48 Cal. [331] 334; Ex parte McLaughlin, 41 Cal. 211, 10 Am.Rep. 272. If deprived of a verdict because an error of law would result in a mistrial, except as provided by statute therefor, the discharge is equivalent to an acquittal, and is a bar to a subsequent trial. People v. Tong, supra. A defendant having been placed in jeopardy, it is a bar to another indictment or information for the same offense or for an attempt to commit it, or for an offense necessarily included therein, of which he might have been convicted under the first indictment or information. People v. Zeigler, 135 Cal. 462, 67 P. 754, 56 L.R.A. 882."

[3] Respondents seek to avoid the results of these rules by pointing out the alleged errors in impaneling the jury, which we have mentioned, and by arguing that jeopardy cannot attach unless the proceedings leading up to the swearing of the jury be so free from error that a verdict of guilty, if one be returned, will not be upset on appeal. This seems to be the rule in some states, if not in California. There seems to be much common sense and much sound argument behind such a rule. It might well be asked, how can a defendant be in danger of being deprived of life or liberty if the jury which tries him cannot return a verdict under which he can be punished? However, from the view we take of the case that question is academic here. The errors in impaneling the jury, pointed out by respondents, are not sufficiently substantial to cause a reversal of a judgment if petitioners had been convicted. Further, those errors, if any, were waived by petitioners. That such errors may be waived, and thereby their prejudicial effect, if any, be destroyed, is well established. People v. Baillie, 133 Cal. App. 508, 24 P.(2d) 528; People v. Kelly, 132 Cal.App. 118, 22 P.(2d) 526.

[4] It is true that the code provides the order in which peremptory challenges should be exercised. It is also true that it has been held that a departure from such order must be shown to be prejudicial and that where the established order was departed from and a defendant accepted the jury before his peremptory challenges were exhausted he suffered no prejudice from the error. People v. Troutman, 187 Cal. 313, 201 P. 928. See People v. Durrant, 116 Cal. 179, at page 197, 48 P. 75. We conclude that the error in the order of peremptory challenges was not prejudicial and that it was waived.

[5] Respondents urge that the names of all the jurors from which the jury is to be drawn must be in the jury box from which the names of the prospective jurors are drawn. This statement is only true if subjected to several important exceptions. The exact procedure followed in the instant case was approved in the case of People v. Loomer, 13 Cal.App. 654, 110 P. 466, as authorized by the provisions of section 248 of the Code of Civil Procedure. Furthermore, the procedure followed here was upon the suggestion and at the request of counsel for petitioners. Any possible error was thereby waived. A defendant will not be permitted to lead a trial judge into unsubstantial error and then be heard to complain of it.

[6] It is our conclusion that petitioners were placed on trial in a court of competent jurisdiction on an indictment properly found and drawn, before a jury legally impaneled and sworn. It follows that under the rules prevailing in California jeopardy attached when the jury was sworn and that respondents have lost jurisdiction to try them again for the offenses of which they, in the eyes of the law, have been acquitted.

It is ordered that the demurrer to the amended petition be overruled and that the writ of prohibition be issued as prayed for.

We concur: BARNARD, P. J.; JENNINGS, J.

20 Cal.App.2d 534

GALIANO et al. v. PACIFIC GAS & ELECTRIC CO.

Civ. 5655.

District Court of Appeal, Third District, California.

April 26, 1937.

1. Appeal and error ⇐973

Appellate courts, in considering whether action of trial court was well founded, apply stricter rule to action ordering directed verdict or granting judgment notwithstanding verdict than where new trial only has been granted.

2. Appeal and error ⇐927(7), 934(1)

Appellate court has duty to read testimony most favorable to party against whom directed order has been made or judgment entered notwithstanding verdict, and where there is any testimony which would substantially support verdict in favor of opposing party, trial court's action cannot be upheld.

3. Judgment ⇐199(3)
Trial ⇐142

Where testimony shows as matter of law that no reasonable conclusion is legally deducible from evidence, other than that which compels directed verdict or justifies entering of judgment notwithstanding verdict, trial court has duty to make order directing verdict or entering judgment as law requires notwithstanding verdict.

4. Judgment ⇐199(1)

In action against owner of canal, which passed under highway, and which was constructed before highway, for negligent failure to put up barriers or markers which allegedly was cause of decedent falling into canal and drowning, owner of canal *held* entitled to judgment notwithstanding verdict, since liability, if any, was imposed by statute on person, municipality, county, or state having charge of highway (Pol.Code, § 363r, as added by St.1933, p. 898).

5. Dedication ⇐61

Erection or excavation already existing and not otherwise unlawful does not become unlawful when land to which it is immediately contiguous is dedicated to the public as a way, though it prevents way from being safe as it otherwise would have been.

6. Easements ⇐64
Highways ⇐199

Possessor of land over which there is public highway or private right of way is not subject to liability for bodily harm caused to travelers on highway or persons lawfully using way by his failure to use reasonable care to maintain highway or way in safe condition for their use, or to warn them of dangerous conditions known to him and not likely to be discovered by them.

7. Highways ⇐188

Duty to maintain highway in condition safe for travel is on municipal subdivision which holds highway open to public for travel, which duty includes not only duty to maintain surface of highway in condition reasonably safe for travel, but duty of warning traveling public of any other condition which endangers travel.

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

Action by Rose Galiano and others against the Pacific Gas & Electric Company. From a judgment entered in favor of the defendant notwithstanding a verdict for plaintiffs, the plaintiffs appeal.

Affirmed.

Lowell L. Sparks, of Auburn, and White, Miller, Needham, Harber & Mering, of Sacramento, for appellants.

Thomas J. Straub, W. H. Spaulding, and Clinton F. Stanley, all of San Francisco, and T. L. Chamberlain, of Auburn, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

This cause is before us upon an appeal by the plaintiffs from a judgment entered by the court in favor of the defendant, notwithstanding a verdict in favor of the plaintiffs. The judgment was entered in favor of the defendant pursuant to the provisions of section 629 of the Code of Civil Procedure (as amended by St.1935, p. 1956). The action was prosecuted by the plaintiffs to obtain damages for and on account of the death of Antonio Galiano, which occurred on or about the 1st day of July, 1934, alleged to have resulted from the negligence and carelessness of the defendants relative to the maintenance of a certain watercourse known as and called "Dutch Ravine Canal," owned and

operated by the defendant. Antonio Galiano, theretofore being the husband of the plaintiff, Rosa Galiano, and father of the minor children named in the title to this action.

Antonio Galiano came to his death at a point on the state highway a short distance east of a tunnel under a hill in the town of Newcastle. From the tunnel the highway leads in an easterly direction curving slightly to the southward across a low depression known as the "Dutch Ravine," along which is situate the canal belonging to the defendant above mentioned. The concrete portion of the highway is twenty feet wide. Along each side of the concrete highway is a macadamized strip two feet wide. On the southerly side of the highway involved in this action there is a dirt shoulder approximately fifteen feet wide. The fill constructed by the state highway over the "Dutch Ravine" is approximately eleven feet in height, or that distance above the contour of the ravine. The sides of the fill are steep.

The canal belonging to the defendant was in operation long prior to the construction of the highway. In order to pass over the canal and leave no obstruction to the flow of the water therein, the state highway department laid down under the entire width of the highway constructed as we have just stated, two galvanized iron pipes approximately forty-two inches in diameter. On the southern side of the fill it constructed a concrete bulkhead and side walls which would conduct the water into the pipes which we have just mentioned, without any portion of the embankment being washed away by the current of the water in the canal.

At the time Antonio Galiano met his death the water in the canal was approximately three and one-half feet in depth. While called a "culvert" in the transcripts and in the briefs, the structure just mentioned was really a conduit built for the purpose of allowing the water to flow in the canal unobstructed, and was not in the ordinary sense of the word a culvert. The entire structure was at least eleven feet below the surface of the roadway. All of the structure just mentioned was within the exterior limits of the highway, and also of the embankment or fill constructed under the supervision of the state highway. There were no railings or guardwalls or markers of any kind indicating either the existence of the canal or of the bulkhead or headwalls constructed by the state at the southerly end of the two galvanized iron pipes. There were, at the time Antonio Galiano met his death, no fences or posts or markers of any kind along the southerly side of the fifteen-foot earth shoulder which we have mentioned. In other words, there was first in the structure a twenty-foot concrete slab, a two-foot macadamized shoulder, and then an earthen shoulder on the same level fifteen feet wide. At the outer edge of the earth's shoulder the fill sloped down for a distance of eleven feet. The record shows a man's foot tracks leading down from the outer edge of the earth's shoulder to the concrete bulkhead above the iron pipes which we have mentioned, indicating that the deceased in some manner went down the southerly side of the embankment to the concrete bulkhead, stepped off into space and met his death by drowning in the canal. It appears that the current carried him through one of the iron pipes down to a grating in the canal a short distance to the northward from the highway, where his body was subsequently found.

The circumstances leading up to the tragedy which we have mentioned, as set forth in the transcript, show that the decedent was driving along the state highway between Newcastle and Auburn, had reached the point which we have mentioned, when by some means he came into collision with the rear of an automobile owned and driven by one Solaro. Subsequent to the collision the cars were driven to the southerly edge of the two-foot macadamized shoulder, leaving a considerable space between the car operated by the deceased and the outer edge of the dirt shoulder. This distance is alleged by the respondent to have been at least ten feet. There seems a little confusion as to the testimony in this respect by reason of a witness first having estimated the distance at somewhat less, and then corrected his statement to show that at least there was ten feet between the car driven by the deceased and the southerly edge of the dirt shoulder. Whatever the distance may have been, the testimony is clear that there was sufficient space between the car and the edge of the dirt shoulder to permit one walking back and forth with entire safety. The time of the collision between the two cars was somewhere between 9 and 10 p. m. There was no moon, and the testimony indicates that the night was rather dark.

After the collision just referred to it appears that the deceased and Mr. Solaro engaged in an argument as to who was responsible, following which Mr. Solaro asked some girls who appeared to have arrived on the scene in a car not involved in the collision, to request a traffic officer to come to the scene and settle their differences. Immediately following this request made by Solaro it appears that the deceased went to his car, took out a package of some kind, not seen at the time by any witness, moved away from the car, and was not seen thereafter until his body was found at the grating in the canal. Shortly after the incident related, a traffic officer by the name of Marvin arrived on the scene, made such investigations as he could, and finally found the body of the deceased at the grating or trash gates heretofore mentioned. Alongside of his body was also found a three-gallon keg of wine.

Considerable testimony was introduced bearing upon the question of the intoxication of the deceased at the time he caused his car to come in collision with the rear end of the car operated by Solaro, but from the view we take of the case it is immaterial whether the deceased was or was not under the influence of intoxicating liquor. The testimony would indicate, however, that the deceased knowing that a traffic officer was about to come and investigate the circumstances of the collision, had in mind concealing the three-gallon keg of wine, and in an attempt so to do, met his death by either stepping or falling off the headwall at the base of the fill and just above the iron pipes laid in the canal. Upon the state of facts just related the jury rendered a verdict in favor of the plaintiffs, but upon motion therefor, judgment was entered in favor of the defendant.

[1-3] In considering the question whether the action of the trial court was well founded, we may agree with all that the appellants have said with regard to this being a nation where a jury trial is held to be a sacred right, and that in either ordering a directed verdict or granting a judgment notwithstanding a verdict the rule to be applied is much stricter than that to be followed by appellate courts when a new trial only has been granted. It is the duty of the appellate court to read the testimony most favorably for the party against whom such a directing order has been made or a judgment entered notwithstanding the verdict, and if there is any testimony which substantially would support a verdict in favor of the opposing party, the action in directing a verdict or in entering a judgment notwithstanding a verdict cannot be upheld. On the other hand, if the testimony shows as a matter of law that no reasonable conclusion is legally deducible from the evidence, other than that which compels a directed verdict or justifies the entering of a judgment notwithstanding the verdict, it is the duty of the trial judge to make the order directing a verdict or to enter such judgment as the law requires, notwithstanding the verdict of the jury. In other words, if the one against whom the verdict is rendered, or is about to be rendered, is shown not to be legally liable, it is the bounden duty of the trial court to either take the case from the jury or to enter such judgment as the law requires.

This brings us to the decisive question: If any one was negligent in any manner leading to the death of the deceased, other than negligence on his part, upon whom does the law fix the responsibility?

As we have shown, the deceased came to his death by passing straight down the embankment to the concrete headwall above the canal, and then, off into space. Whether he walked or fell is wholly immaterial.

In determining liability three factors are to be considered: First. The fact that the highway was laid out and constructed over the canal long after the canal had been in operation. Second. The width of the highway, the character of the traveled portion thereof. Third. The apparent peril, if any, offered to the traveling public.

In the cases relied upon by the appellants, with the exception of one or two, the peril complained of was attendant upon the use of the highway as a highway, and not upon a peril outside of the portion of the highway prepared for public travel and incident to the use of the highway by the traveling public. There seems to be this distinction made in practically all of the cases, save and except where the peril exists in the nature of a trap. One of the cases relied upon by the appellants involves the doctrine applicable to structures specially attractive to children, as well as a concealed peril.

In Gorman v. County of Sacramento, 92 Cal.App. 656, 268 P. 1083, the dangerous condition involved in that action was di-

rectly attendant upon, and incident to the use of the highway as a highway. The facts show that the board of supervisors of the county of Sacramento had erected a bridge across a watercourse, and neglected to construct any railing or guards of any description whatever along the outer edge of the bridge. The deceased, whose death was alleged as the basis for damages, in that case, was a boy. While familiar with the bridge, was crossing the same at nighttime upon a bicycle, and by some means or other went over one side of the bridge into the stream below and was drowned. The facts recited in the opinion in that case show the dangerous condition of the structure to anyone using the highway as a highway.

In the cases of Gerberich v. Southern California Edison Co., 5 Cal.(2d) 46, 53 P.(2d) 948, and Norton v. City of Pomona and Southern California Edison Co., 5 Cal. (2d) 54, 53 P.(2d) 952, the danger complained of, and which lead to the injuries for which damages were sought in those cases, consisted of what we have just stated, the maintenance of a peril in the highway when used as a highway. It appears that persons riding in an automobile came in collision with an electric light pole which had been erected by the Southern California Edison Company at a point about four feet from the edge of the macadamized shoulder adjoining the concrete portion of the highway; that the dirt shoulder on both sides of the pole had frequently been used by the traveling public whenever the highway was congested with traffic. It was urged on behalf of the appellant, Southern California Edison Company, that the pole had been erected under permission of the city authorities, and therefore did not constitute a public nuisance. It was held, however, that the question as to whether the pole was maintained in a negligent manner, was for the jury. In all three of the cases just cited the facts show conclusively that the acts of neglect complained of constituted a continuing menace to the safety of all persons who were using the highway as a highway, and in no sense were departing therefrom for any personal purpose or undisclosed motive.

In the case of Sanchez v. East Contra Costa Irr. Co., 205 Cal. 515, 271 P. 1060, the opinion discloses facts which readily distinguish that case from the one at bar. There, a child was injured by falling into a ditch and being carried into a concealed syphon, while the court held that so far as the open ditch or canal was concerned, the child was supposed to have had knowledge of the dangers attendant upon falling into the same, but that it could not be held as having knowledge of the syphon which appeared to have been obscured by bushes or other growth at the opening thereof. The Sanchez Case has nothing to do with the use or maintenance of a highway.

In Barrett v. Southern Pacific Co., 207 Cal. 154, 277 P. 481, it appears that the appellant erected a pier in the highway, under the authority of the city council, and while the case was reversed for other reasons, the court apparently held that the erection of the pier in the traveled portion of the highway constituted a continuing menace to the users of the highway.

The headwall of the culvert, or more properly speaking, the conduit for the passage of water under the highway, offered no peril to the use of the twenty-foot concrete strip or of the two feet of asphalt or macadamized shoulder on each side thereof, or the fifteen-foot earth shoulder on the southerly side of the highway, when used by the traveling public for highway purposes, and so long as the deceased used the same for the purposes for which the fill across the ravine, the concrete slab, asphalt or macadamized shoulder and earthen shoulder were erected, there was no menace whatever to his personal safety. It was only when he left the highway or the earthen shoulder thereof that there existed any menace to his personal security.

The three propositions which we have advanced, and are considering, are so correlated that they may properly be considered under one heading as to where the responsibility lies, if any.

The respondent advances, among other objections as to its liability, the claimed fact that the burden was upon the appellants to show that there was some necessity for the deceased going over the edge of the embankment, or that it was not an act taken in furtherance of his own pleasure (citing the cases of Biggs v. City of Huntington, 32 W.Va. 55, 9 S.E. 51, and City of Dayton v. Taylors', Administrators, 62 Ohio St. 11, 56 N.E. 480), and suggested that the deceased's act was, as we have heretofore mentioned, for the purpose of removing from his car a concealed keg of wine, and that whether he walked off, or fell from the embankment

and over the headwall heretofore mentioned, is immaterial, as he was in furtherance of his own purposes, and not in the use of the highway as a highway. We do not deem it necessary to discuss this question or further refer to the two cases just mentioned.

As to the liability of one who voluntarily or unnecessarily deviates from the traveled portion of a highway, and in so doing meets with an accident from some cause outside of the traveled way and cannot recover from an injury so sustained, we may cite 29 C. J. page 703.

[4] In addition to the cases hereinafter mentioned decided prior to 1933, relative to the control and management of highways by municipalities, counties, or states constructing the same, we may call attention to section 363r of the Political Code, added in 1933, Statutes 1933, chapter 326 (page 898), giving to the department of public works control of all roads and highways, etc. Thus, in this case, if any negligence whatever existed by reason of there being no barrier or markers of any kind along the southerly edge of the fill which we have mentioned, or of there being no guard rail over the headwall and sidewalls of the concrete structure at the base of the fill, the liability, if any, must rest upon the person, municipality, county or state having charge thereof.

In the City of Madera v. Madera Irr. Co., 159 Cal. 749, 115 P. 936, the Supreme Court had before it the identical question which we are now considering. It is there said (we quote from the syllabus): "Section 551 of the Civil Code, requiring the owners of canals, flumes, or other appliances for conducting water, crossing or running along a public highway, to construct, maintain, and keep in repair such bridges across the same as may be necessary to the safe and convenient use of the highway by the public, does not impose the duty upon such owners of constructing and maintaining bridges across the same upon the lines of streets or highways laid out and opened after the construction of the canal, flume, or other appliance." To the same effect is the case of South Yuba Water Co. v. City of Auburn, 16 Cal.App. 775, 118 P. 101. The canal maintained in this case by the defendant does not parallel the highway, but is simply a watercourse passing almost at right angles under the fill which we have mentioned, and no portion of the canal furnishes a trap or menace to the use of the highway as a highway, and is not exposed, save and except a short portion thereof between the southerly boundary of the highway and the entrance to the conduit under the fill.

In going down to the canal from the highway following the course indicated by the evidence as taken by the deceased, the canal could not be reached without going over the concrete headwall thereto erected and maintained by the highway department of the state of California.

[5] In 14 A.L.R. page 1412, we find the following: "An erection or excavation already existing, and not otherwise unlawful, does not become unlawful when the land to which it is immediately contiguous is dedicated to the public as a way, although it prevents the way from being as safe as it otherwise would have been. Fisher v. Prowse (1862) 2 Best & S. 770, 121 Eng.Reprint, 1258, 31 L.J.Q.B.(N.S.) 212, 8 Jur.(N.S.) 1208, 6 L.T.(N.S.) 711; Robbins v. Jones (1863) 15 C.B.(N.S.) 221, 143 Eng.Reprint, 768, 33 L.J.C.P.(N.S.) 1, 10 Jur.(N.S.) 239, 9 L.T.(N.S.) 523, 12 Week.Rep. 248."

In Flansburg v. Town of Elbridge, 205 N.Y. 423, 98 N.E. 750, 41 L.R.A.(N.S.) 546, it is held (quoting from the syllabus): "The statutory liability of a town for injury caused by the neglect of its highway commissioners to keep in repair its highways and bridges does not extend to an injury caused by failure to extend a guard for a culvert embankment outside the traveled part of the highway, so that a traveler whose horse had wandered in the dark out of the beaten path was carried over the embankment."

[6, 7] In section 349, volume 2, "Restatement of the Law of Torts," we find the following: "A possessor of land over which there is a public highway or private right of way is not subject to liability for bodily harm caused to travelers upon the highway or persons lawfully using the way by his failure to use reasonable care (a) to maintain the highway or way in safe condition for their use or (b) to warn them of dangerous conditions thereon which, although not created by him, are known to him, and which they neither knew nor are likely to discover. * * * The duty to maintain a highway in a condition safe for travel is, in America, in some states by statute and in others by common law, placed upon the municipal subdivision which holds the highway open to the pub-

lic for travel. This duty includes not only a duty to maintain the surface of the highway in a condition reasonably safe for travel, but also a duty of warning the traveling public of any other condition which endangers travel, whether caused by a force of nature, such as snow and ice, or by the act of third persons, such as a ditch dug in the sidewalk or cartway or an obstruction placed thereon," etc.

A further illustration is given in section 368 of the same volume of a possessor of land upon which there is a deep quarry and a highway is laid out and established thereafter running along the edge of the quarry. It is the duty of the municipality maintaining the highway for public travel to maintain fences or guards to protect the traveling public.

In 13 Ruling Case Law, § 311, page 381, the rule as to liability for obstructions outside of the traveled portion, but within the side lines of the highway, is thus stated: "There seems to be considerable conflict of authority as to the liability of municipal and quasi-municipal corporations for injuries sustained by travelers as a result of defects and obstructions within the limits of a street or highway, but outside the traveled portion thereof. They are, however, generally held to be liable for injuries resulting from such defects or obstructions which are in such proximity to, or so connected with the traveled portion of the way as to render it unsafe to those traveling thereon, or where the danger is hidden and the defect or obstruction amounts to a trap or a snare." In the same volume, section 379, we find the further statement: "The fact that a traveler goes outside the limits of the highway or that portion of it set aside for travel voluntarily, and without good cause, may amount to contributory negligence precluding recovery for resulting injury; as, for example, where he attempts to drive from one traveled track to another several feet distant therefrom without investigating the intervening ground which is not used as a road, or where he knowingly or carelessly departs from a known safe-way and goes heedlessly across the street and beyond its limits and upon the land of an abutting owner and is there injured by falling over a retaining wall."

As to the duty of the authority constructing the highway over the waterways or canals subsequent to the construction of the canal or waterway to maintain the highway in a safe condition, a number of additional cases might be cited, but those to which we have referred appear to us to be conclusive.

In the Flansburg case, supra, it appears that the macadamized roadway was sixteen feet wide with shoulders seven feet on either side constructed of earth; that the driver of the automobile who was injured drove off the roadway across the shoulders and into a pit seven feet distant from the edge of the macadam which was there before the highway was constructed, it was held that the owner of the land was not liable.

In McChesney v. Dane County, 171 Wis. 234, 177 N.W. 12, it was held that one traveling outside of the way prepared for the public constitutes negligence as a matter of law. Practically to the same effect are the cases of Tasker v. Inhabitants of Farmingdale, 85 Me. 523, 27 A. 464, and Carey v. Town of Hubbardston, 172 Mass. 106, 51 N.E. 521.

The most recent case supporting the action of the trial court in entering judgment for the respondent is that of Otten v. Big Lake Ice Co. (Minn.) 270 N.W. 133. In that case an ice company, pursuant to plans and specifications approved by the highway department, conducted a passageway under the improved portion and traveled portion of the highway, for the purpose of passing ice thereunder. No precautionary measures were erected, or called for their erection by the plans adopted by the highway department, for guarding the passageway for ice, outside of and beyond the portion of the highway set apart for use of the traveling public. It appears that the party injured went outside of the portion of the highway set apart for use of the traveling public, and was injured by falling into the tunnel or excavation constructed for the passage of ice through and beyond the tunnel. It was held that the defendant ice company was not liable, as it was the duty of the highway department to take all precautionary measures necessary to protect the traveling public from harm. The circumstances attendant upon this case which we have set forth herein, and the cases which we have cited, we think establish conclusively that if any duty existed upon the part of any one to place a guard rail along the southerly bank of the fill across the ravine or along the head or sidewalls of the conduit at the base of the fill, that duty rested upon the state of California or the highway department thereof, and not

upon the defendant, and therefore, if any neglect has resulted in the death of Antonio Galiano, it is chargeable not to the defendant, but to the state of California or the highway department thereof, against which this action is not prosecuted.

What we have said as to the liability of a municipality, highway department, or state constructing a highway over a waterway already in existence, has only been necessary in order to establish the nonnegligence on the part of the respondent and the correctness of the act of the trial court in entering judgment in favor of the respondent notwithstanding the verdict of the jury, and is not to be interpreted as an expression of an opinion by the court that under the circumstances disclosed in this case, negligence is shown on the part of any one having to do with the construction or maintenance of the highway involved herein.

It is also evident from what we have said in the foregoing that whether the deceased Antonio Galiano was or was not presumed to have taken due care for his own safety, does not affect the liability of the defendant in this action, and, therefore, that question is not discussed herein.

The judgment is affirmed.

I concur: THOMPSON, Acting P. J.

Deeming himself disqualified, Judge HELD does not participate in the decision in this case.



20 Cal.App.2d 572

ADAMS v. DOLLAR S. S. LINES, Inc., Limited.

Civ. 10128.

District Court of Appeal, First District, Division 1, California.

April 28, 1937.

Rehearing Denied May 28, 1937.

1. Seamen ⇐29(5)

Whether typhoid fever contracted by seaman was traceable to ship's water or food, so as to render shipowner liable under shipping articles whereby owner agreed to furnish crew with proper food and water, *held* for jury, notwithstanding evidence disclosed that seaman might have contracted disease from other sources.

"Typhoid fever" is an acute infection of the intestines caused by the typhoid germs taken into the system by drinking water contaminated with sewage, also by eating uncooked food contaminated by such polluted water. The germs may be taken into the system in other various ways, such as touching lips with hands or with eating or drinking utensils or other articles which have contracted typhoid germs, and germs may be transmitted by so-called typhoid carrier, which is a person who has had typhoid fever and completely recovered, except that the germs remain alive usually in the gall bladder and such people pass out the germs in feces and contaminate food and sewage which gets into the water.

[Ed. Note.—For other definitions of "Typhoid Fever," see Words & Phrases.]

2. Seamen ⇐29(5)

As respects shipowner's liability to seaman who contracted typhoid fever, whether shipowner's failure to take protective measures in boiling or distilling water and thoroughly cooking food constituted negligence *held* for jury (Jones Act § 33, 46 U.S.C.A. § 688).

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by F. Adams against the Dollar Steamship Lines, Incorporated, Limited. From a judgment for defendant, plaintiff appeals.

Reversed.

H. W. Hutton, of San Francisco, for appellant.

Irving H. Frank, Nathan H. Frank, and L. Charles Gay, all of San Francisco, for respondent.

KNIGHT, Justice.

Plaintiff appeals from a judgment entered in defendant's favor pursuant to an order granting defendant's motion for nonsuit.

The action was for damages arising out of a permanent sickness contracted by plaintiff while in defendant's employ as a seaman aboard the ship President Garfield on a voyage around the world. The voyage began and was to have ended in San Francisco, and the route followed was via the

Orient, across the Indian Ocean, through the Suez Canal, and across the Mediterranean Sea to the United States via New York; thence on to San Francisco by way of the Panama Canal. On the night of May 28, 1930, the ship sailed from Marseilles, the last port of call before reaching New York, and soon after it passed through the straits of Gibraltar plaintiff was taken sick; but he remained in the ship's hospital for only four days and then resumed his regular duties. The ship arrived in New York on June 10th, proceeded to Boston on June 12th, and returned to New York on June 16th, and remained there until June 20th, when it sailed for the west coast. A few hours before its departure plaintiff while working on deck was taken violently ill and sent to the United States Marine Hospital at Stapleton, Staten Island, N. Y., for treatment. After being examined, he was instructed to return in three days, at which time he entered the hospital as a patient. His case was tentatively diagnosed as acute gastritis; subsequently it was changed to food poisoning; and later, after extensive laboratory work had been done, it was ascertained he was suffering from typhoid fever. On July 19th he was operated upon for intestinal perforations produced by typhoid ulcers. This was followed by an attack of pleurisy. He was released from the hospital on October 27, 1930, and remained in New York until November 6th, awaiting transportation by ship back to San Francisco. On his arrival in San Francisco he went to his home in Seattle; but in March, 1931, returned to San Francisco to enter the Marine Hospital, where it was found he was afflicted with pulmonary tuberculosis. He remained there until July, 1932, and was then sent to the tuberculosis hospital at Fort Stanton, N. M. After being a patient there twenty months he returned to his home in Seattle, and remained under medical treatment until February, 1935, when he returned to San Francisco to attend the trial of this action. At that time he was still seriously ill and unable to perform any kind of work.

Under the shipping articles pursuant to which plaintiff was employed, defendant agreed to furnish the crew with proper food and water, and plaintiff's cause of action was based upon allegations that defendant "failed so to do but on the contrary carelessly and negligently furnished putrid food and water contaminated with some bacteria * * * capable of conveying typhoid fever germs"; that plaintiff partook of said food and water, and as a result thereof contracted typhoid fever. There is ample evidence to prove that plaintiff's pleuritical and tubercular ailments were the outgrowth of the typhoid fever with which he was originally stricken; therefore the principal question involved is whether there are any circumstances shown by the evidence from which it may be reasonably inferred that the typhoid fever was traceable to the ship's water or food. If so, and regardless of whether it appears also that he may have contracted the disease from other sources, the court erred in taking the case from the jury.

According to the medical testimony, typhoid fever is an acute infection of the intestines, caused by typhoid germs taken into the system by drinking water contaminated with sewage; also by eating uncooked food contaminated with such polluted water. The germs may be taken into the system in other various ways, for example, by touching the lips with the hands or with eating or drinking utensils or other articles which have contacted typhoid germs. The germs may be transmitted also by a so-called typhoid carrier, that is, a person who has had typhoid fever and completely recovered, except that the germs remain alive, usually in the gall bladder, and these people pass out the germs in feces and contaminate food and sewage which gets into the water. The medical testimony further shows that the incubation period of typhoid fever is fourteen days after consuming the germs. Some cases, the "walking type," may go a little longer, but two weeks is the average. Furthermore, it appears from the medical testimony that typhoid germs are quite prevalent in all Asiatic ports, and to some extent in many other foreign ports; that typhoid fever is a preventable disease, and may be avoided by drinking only boiled or distilled water and eating only cooked food.

The President Garfield was used altogether for round-the-world cruises, each trip consuming approximately four months. The ports of call were Honolulu, ports of Japan, Shanghai, Hongkong, Manila, Singapore, Penang, Colombo, Suez, Alexandria, Naples, Genoa, Marseilles, New York, and Boston; thence back to New York and on to San Francisco via the Panama Canal, stopping at ports en route. The ship's water supply, for both passengers and crew, was carried in six large tanks, and on each

trip two of these tanks were emptied and cleaned, one at Shanghai and one at Singapore, the work being done by resident Chinese labor. The work consisted of scaling the cement coating from the inside of the tanks, and then recoating them with cement. The water supply was replenished as needed at different ports of call. On this particular trip it was taken on at every port of call except Shanghai. The ship was provided with evaporators for distilling water, but they were intended to be used only in cases of emergency, it being cheaper to buy the water than to heat steam to evaporate it. Before taking water at ports of call the ship's doctor ascertains from the public health doctor at the local port whether the water is suitable, and, if it is, the chief engineer is directed to fill the tanks. As to the food used on the voyage, there was no evidence introduced showing where or under what circumstances it was obtained; but it was shown that passengers and crew ate the same food.

The ship sailed from Manila on April 22d, and when about four days out serious sickness developed among members of the crew, so that by the time the ship reached the Gulf of Aden, some two or three weeks later, there were fifteen or sixten crew patients in the ship's hospital. No complaint was made about the ship's water, it had no bad odor, and was always fresh. But soon after leaving Shanghai complaint was made to the captain by certain members of the crew about the food. It was claimed that it was not only putrid, but improperly cooked; and after the ship entered the Red Sea the ship's doctor also complained to the captain about the matter, saying that there must be something wrong because of the increasing number of cases of sickness among the crew; and the doctor demanded that he be allowed to inspect the refrigerator where the food was kept. After having done so, and at his direction, certain quantities thereof, consisting of meats, cheese, and other foodstuffs, were thrown overboard. The federal law (46 U.S.C.A. § 201) required entries to be made in the ship's log of every case of illness or injury happening to any member of the crew, with the nature thereof and the medical treatment, and provided for the imposition of penalties for noncompliance with said statutory requirements, but no such entries were made; consequently, aside from the cases of two members of the crew, named Hamilton and Seligman, who were witnesses at the trial, the evidence does not show the names of the crew members who were sick on the voyage, the diseases with which they were afflicted, nor the duration thereof. When the ship arrived in New York, four members of the crew, besides plaintiff, were sent to the Stapleton Hospital on account of sickness. Two of the cases were definitely diagnosed as typhoid fever. The other two were treated for deviation nasal septum. One of the four was Hamilton. The names of the other three were not revealed. Seligman also quit the ship at New York on account of sickness; but he went up to Cape Cod to stay with a friend, and there recuperated. Whether Hamilton was one of the two afflicted with typhoid fever does not appear. He stated at the trial that he was, but on defendant's motion his statement was stricken out as being his conclusion. No effort was made to prove the disease from which Seligman suffered. But there was a marked similarity of symptoms between their cases and the case of plaintiff, such as high fever, loss of appetite, severe headaches, diarrhea, weakness, and great loss of weight. Hamilton and Seligman were stricken about the same time, just before the ship entered the Red Sea. Hamilton remained in the ship's hospital until the ship reached New York. The next day, June 11th, he was sent to Stapleton and there remained under treatment for two months. Seligman, on account of so many of the crew's being sick, was put to work half time after leaving Marseilles. But, as stated, he quit the ship at New York. At that time he was extremely weak, having lost forty-five pounds in weight since leaving Singapore.

[1] With respect to plaintiff's illness, the evidence shows without dispute that the typhoid fever with which he was stricken manifested itself in violent form on June 20th. Therefore, since according to the medical testimony the incubation period for the disease is fourteen days, it would follow, as plaintiff contends, that he became infected with typhoid germs aboard ship while it was crossing the Atlantic Ocean. In that state of the evidence, and taking into consideration all of the facts and circumstances hereinabove set forth surrounding the large number of cases of undetermined sickness which developed among the crew between Manila and Suez, it is our opinion that plaintiff established a prima facie case, and consequently was entitled to have the question of whether his sick-

ness had its origin in the ship's water or food submitted to the jury.

In support of the trial court's ruling defendant points to evidence showing that plaintiff was ashore at every port of call on the voyage except Penang, and that while ashore he ate and drank freely and associated indiscriminately with local inhabitants; that other members of the crew also were ashore at different ports of call; and that plaintiff slept in a forecastle with three other sailors, one of whom was Seligman; and it is argued therefrom that plaintiff doubtless picked up the germs while ashore, or perhaps from some member of the crew who had been ashore. But even so, if, as seems apparent, the facts and circumstances above related are sufficient to justify the inference also that the ship's food or water was responsible for his illness, the determination of the question of the origin of the disease should have been left to the jury. And in this connection plaintiff, in support of the claim that there was something wrong with the ship's drinking water, calls attention to the evidence showing that Hamilton was ashore only at Honolulu; that thereafter, while aboard ship, he drank the ship's water from the tanks, and that it was many weeks after the ship left Honolulu that he was stricken; that on the other hand another sailor named Ahern, who was also a witness at the trial, was ashore at every port, but while aboard ship drank only distilled water from the coffee urn, and that he was not sick at all.

Defendant points out also that according to the medical testimony putrid food does not of itself germinate typhoid germs and consequently does not cause typhoid fever, unless of course the food had contacted water polluted with such germs and is not properly cooked; and it is argued therefrom that the ship's food could not have been the cause of plaintiff's illness, even conceding that some of it was spoiled. The evidence does show, however, beyond question that prior to the time the putrid food was dumped overboard a large number of the crew were made seriously ill; and therefore, since there is no evidence in the record showing that the illness from which they suffered was not typhoid fever, it cannot be held, as a matter of law, that no part of the spoiled food was infected with typhoid germs. The question, in our opinion, was one of fact for the determination of the jury.

Defendant further contends that in any event it was impossible that either the food or water was infected with typhoid germs because, if either had been, there would have been a general epidemic of typhoid fever among the passengers and the crew. No doubt that is true, but so far as our attention has been called there is no evidence showing whether or not any of the passengers were made ill on the voyage; or, if so, how many; and in regard to the crew, as stated, owing to the failure to comply with the law requiring cases of sickness and the nature thereof to be entered in the ship's log, it cannot be held as a matter of law that the fifteen or more who were made ill on the voyage were not typhoid cases.

[2] Finally, defendant contends that plaintiff's action is founded on a federal law known as the Jones Act (section 33 [46 U.S.C.A. § 688]), which requires proof of negligence in order to recover damages; and that therefore, even though the evidence herein be deemed legally sufficient to justify the inference that the ship's food or water was the proximate cause of plaintiff's sickness, no recovery may be had because there is no evidence of negligence on the part of defendant. Plaintiff evidently takes the position that the action is not based on negligence, but is one for breach of contract to furnish proper food and water, and that consequently proof of negligence is not essential. However that may be, the evidence shows that typhoid fever is a preventable disease, and that the means of prevention consist in boiling or distilling the water, and thoroughly cooking the food. Here, admittedly, the drinking water was not boiled or distilled; and evidence was given to the effect that the food which was served to the crew was not only spoiled but "wasn't cooked properly." Consequently, assuming that the element of negligence was involved, it was a question of fact for the jury to decide whether under all the existing circumstances the omission on the part of defendant to take the preventive measures mentioned constituted negligence.

We are not to be understood as expressing the opinion that plaintiff did contract his sickness from the ship's food or water. As contended by defendant, the evidence shows a number of sources from which it may have had its inception. We hold merely that the evidence discloses circumstances sufficient to support the inference that the ship's food and water was among those

sources, and that therefore the determination of the true origin of plaintiff's sickness should have been left to the jury.

For the reasons stated, the judgment is reversed.

We concur: TYLER, P. J.; CASHIN, J.



20 Cal.App.2d 518

BENCICH v. MARKET ST. RY. CO. et al.

Civ. 10125.

District Court of Appeal, First District, Division 1, California.

April 26, 1937.

Rehearing Denied May 26, 1937.

Hearing Denied by Supreme Court June 24, 1937.

1. Appeal and error ⇐979(5)
New trial ⇐75(1)

Whether verdict is so inadequate as to be unjustified under evidence and to require new trial is question within discretion of trial court, and order refusing new trial will not be disturbed on appeal in absence of showing of abuse of discretion.

2. New trial ⇐75(4)

$5,000 verdict to fireman, aged 36, who incurred $2,423.37 medical expenses, and suffered $3,441.72 loss of compensation, fractured left humerus, bruises, amputation of part of foot, and injuries to arm and leg, which, with other injuries, required six months' hospitalization, *held* so inadequate as to require new trial.

3. New trial ⇐75(1)

Inadequate recovery may be set aside and new trial granted on ground that evidence does not justify verdict.

4. Appeal and error ⇐900

Every intendment must be indulged in support of a ruling made by trial court.

5. New trial ⇐75(1)

Where evidence clearly establishes that defendant was not guilty of negligence, and hence not liable for any damages, denial of plaintiff's motion for new trial on ground of inadequacy of damages is not error, whether or not damages were inadequate.

6. Appeal and error ⇐989

Review of evidence to determine liability in first instance is condition precedent to decision on question of inadequacy of damages.

7. New trial ⇐75(1)

Where verdict was returned for plaintiff, plaintiff's motion for new trial for inadequacy of damages was denied, and damages were found inadequate on appeal, appellate court would not sustain ruling refusing new trial on ground that it was made because trial court felt that either defendants were not negligent or that plaintiff was guilty of contributory negligence, unless such lack of negligence on part of defendants or contributory negligence was clearly established by evidence.

8. New trial ⇐140(3)

In action for injuries sustained by fireman in collision between interurban street car and fire engine, conflicting evidence *held* not to establish defendants' lack of negligence so clearly as to authorize denial of plaintiff's motion for new trial for inadequacy of damages where damages were inadequate.

9. Appeal and error ⇐989

In action for injuries sustained by fireman in collision between interurban street car and fire engine, where imputed negligence was not pleaded, evidence of negligence of driver of fire engine could not be considered in determining whether trial court properly denied plaintiff's motion for new trial for inadequacy of damages where damages were inadequate.

10. New trial ⇐75(4)

In action for injuries sustained by fireman in collision between interurban street car and fire engine, where evidence as to plaintiff's contributory negligence in failing to warn driver of fire engine of danger was of even weight and damages awarded were inadequate, trial court's denial of plaintiff's motion for new trial for inadequacy of damages could not be sustained on ground that contributory negligence was clearly established.

11. Appeal and error ⇐1178(6)

Limited new trial should not be granted where substantial justice requires that new trial, if granted, should cover all issues.

12. Appeal and error ⇐1178(6)

In action for injuries sustained by fireman in collision between interurban street car and fire engine, where trial court improperly instructed as to imputation of neg-

ligence of driver of fire engine to plaintiff, which was not pleaded, and improperly denied plaintiff's motion for new trial for inadequacy of damages, new trial would not be granted upon issue of damages alone, but would be granted upon all issues.

Appeal from Superior Court, San Francisco County; Daniel C. Deasy, Judge.

Action by John H. Bencich against the Market Street Railway Company and another. From a judgment for less than the amount prayed for, plaintiff appeals.

Reversed and remanded for new trial on all issues.

Edmund J. Holl, of San Francisco, for appellant.

Wm. M. Abbott, K. W. Cannon, and Walter H. Linforth, all of San Francisco, for respondents.

BRAY, Justice pro tem.

Plaintiff brought this action to recover damages for personal injuries sustained in a collision between a fire engine on which he was riding and one of the San Mateo interurban street cars of the defendant company. The case was tried twice. The verdict in the first trial was $20,000, and on motion of defendants a new trial was granted. The second verdict was for $5,000. The defendants made no motion for new trial nor did they take an appeal, but plaintiff moved for a new trial. His motion was denied, and he now appeals, asking that this court reverse the judgment as to the amount of damages awarded, and remand the case for a new trial upon the issue of damages alone.

The accident occurred at the intersection of Seventeenth and Mission streets, which intersection is controlled by traffic signals. The fire engine, responding to an alarm, was proceeding westerly along Seventeenth street. Appellant was sitting alongside of the driver, and was sounding the bell and siren. At about the time the engine reached the intersection, a northbound San Mateo car was crossing the intersection, and the engine collided with this car with great force. The greater part of the briefs of both parties is devoted to a discussion of the evidence, but there seems to be a conflict on every material point. Appellant points out evidence to the effect that the street car was proceeding in disobeyance of the traffic signals; and respondents claim that the evidence established that the fire engine was traveling at an excessive rate of speed and that such speed was the proximate cause of the accident. The evidence on both these points is conflicting.

[1] Plaintiff's notice of intention to move for a new trial is based upon all statutory grounds; however, it is evident that the main ground relied upon is the ground of insufficiency of the evidence to justify the verdict; in other words, that the amount of the verdict is so inadequate that the evidence does not justify it. It is well settled that this ground of motion for a new trial appeals peculiarly to the discretion of the trial court, and its order refusing a new trial will not be disturbed on appeal in the absence of a showing of abuse of discretion. Lambert v. Kamp, 101 Cal.App. 388, 392, 281 P. 690; Donnatin v. Union Hardware & Metal Co., 38 Cal.App. 8, 175 P. 26, 177 P. 845; 2 Cal. Jur. 908.

[2] There can be but little question in this case that the verdict was clearly inadequate, so inadequate, in fact, that the evidence did not justify the jury in awarding such small damages for such a severe injury, and so inadequate that the failure of the court to grant a new trial constituted a clear abuse of discretion in denying the motion for a new trial, unless as contended by respondent the evidence shows that plaintiff is barred from recovering at all. That the verdict is so grossly inadequate in amount, that it should not be permitted to stand is shown by the following facts (and in this respect, only the facts as to which there is no dispute, and the facts most favorable to the respondents are considered, under the rule which requires that every intendment be indulged in support of the ruling made by the trial court): Appellant received in the accident, in addition to a fractured left humerus and bruises from which he has fully recovered, a badly crushed right foot. He spent approximately six months in the hospital, where traction was placed on the arm, pins were inserted into the toes, and traction also applied on the foot and leg. The outer and forepart of the foot eventually became gangrenous and had to be amputated (including all toes except the big toe), and five skin grafts done. The outer and anterior third portion of the foot has been amputated so that at present it extends back about one-half of the fifth

metatarsal to the neck of the fourth and third slightly upon the neck of the fourth. The fifth is intact, as is the big toe. The principal weight bearing surface of the foot is missing, or where the normal foot has a triangle for weight bearing, appellant's foot has but two points for this purpose, namely, the base of the big toe and the heel. To remedy this defect appellant is and will be required to wear a specially prepared brace in his shoe. Appellant was 36 years of age and his occupation was that of a fireman, in the capacity of hoseman, employed by the city and county of San Francisco. His monthly salary was $200, from which was deducted $15 a month, his pro rate contribution to a city employee's public employment relief fund. Under the regulations of the civil service as provided in the charter of the city and county of San Francisco, appellant's status as a fireman was fixed for a remainder of 12 years, at which time he had an optional right to retire. This period, of course, was less than his life expectancy of 30 years. By reason of the injuries received in this accident, appellant was retired upon a life pension of $100 per month. His special damages for nursing, X-rays, laboratory, physicians' services, etc., were $2,423.37. Thus, the allowance made by the jury for pain and suffering and permanent disability was $2,576.63. This is not considering anything for loss of compensation which amounted to $3,441.72. The city and county of San Francisco voluntarily paid appellant's salary ($185 net) up to the time he retired on November 1, 1934, when, as before stated, he commenced to receive a life pension of $100 per month. The city has filed a claim of lien against the judgment herein, under the terms of the Workmen's Compensation Insurance and Safety Act of the State of California, for $5,965.

Respondents contend that this claim of the city is excessive and that until the Industrial Accident Commission determines the percentage of appellant's disability, it cannot be determined whether or not the amount of appellant's special damages exceed the amount awarded by the jury, or how much of this amount appellant will have to turn over to the city. Regardless, however, of the question of whether or not the city gets any of the judgment, it is patent that at the very most the amount awarded by the jury barely, if at all, repays appellant his special damages. Since the accident he was elected treasurer of the David Scannell Club at $85 per month. This being an elective position, it is, of course, problematical how long he will retain it.

[3] While there was direct conflict of testimony as to the extent of appellant's disability, it was conceded by respondent's own medical men that his disability is at least 10 per cent. and that he is unable to climb ladders or place weight on his right foot in a position other than while walking, and then only with the use of a special shoe. It is obvious from the foregoing statement of the evidence strongest in favor of respondents, that the award to appellant is out of all proportion to the expenses necessarily incurred by him as a result of the injury and the damages he has sustained through pain and suffering, and permanent injury and disability. "It is well settled that an inadequate recovery may be set aside and a new trial granted on the ground that the evidence does not justify the verdict." Lambert v. Kamp, supra, at page 390 of 101 Cal.App., 281 P. 690.

[4-6] Respondents contend that even though the damages awarded were inadequate, nevertheless the trial court's action in refusing a new trial should be sustained because the evidence shows, first, that the respondents were not negligent, and, secondly, that the appellant was contributorily negligent, and that it is the duty of the appellate court before considering the question of the inadequacy of damages to determine whether or not the plaintiff is entitled to a verdict at all. They claim that inasmuch as inadequacy of the damages awarded is not a ground for new trial, but can only be considered under the ground of insufficiency of the evidence to justify the verdict, that the court must determine whether or not the evidence on the other issues, particularly negligence and contributory negligence, justifies the verdict. In Lambert v. Kamp, supra, 101 Cal.App. 388, at page 393, 281 P. 690, 691, it is said: "Every intendment must be indulged in support of the ruling made by the trial court. If in its opinion the *evidence, considered as a whole,* was of a character to *clearly* establish the fact that defendant was not guilty of negligence, and hence not liable for any damage (and in the absence from the record of all evidence touching the question of defendant's negligence, we must so assume), then it

constituted no abuse of discretion for the court to deny plaintiff's motion for a new trial, made upon the ground of inadequacy of the amount awarded." (Italics ours.) To the same effect, Donnatin v. Union Hardware & Metal Co., supra, 38 Cal. App. 8, at page 12, 175 P. 26, 177 P. 845. A review of the evidence to determine liability in the first instance is a condition precedent to a decision on the question of inadequate damages. Bakurjian v. Pugh, 4 Cal.App.(2d) 450, 41 P.(2d) 175.

[7] It will be noticed that these decisions hold that in determining the question of whether or not the plaintiff in a case was entitled to a verdict at all, the court is to determine whether the evidence *as a whole* is of a character to *clearly establish* the fact that plaintiff was not entitled to a verdict. Therefore, before an appellate court can conclude that the trial court, in refusing a new trial upon a motion based upon insufficiency of the evidence to justify a verdict because of inadequacy of damages, was actuated by a well-founded belief that the facts did not justify a verdict in favor of the plaintiff at all, there must be not merely a conflict of evidence upon these points but the evidence must clearly establish them. Thus, in this case, for us to determine that the reason the trial court denied a new trial upon the inadequacy of damages was not because of an abuse of discretion in that respect, but because it rightly felt that either the defendants were not negligent, or that the plaintiff was guilty of contributory negligence, such lack of negligence on the part of the defendants or contributory negligence on the part of the plaintiff must be *clearly established* by the *evidence as a whole*. It is not sufficient that there be merely some evidence in this respect or that there be a conflict. To hold otherwise would mean that in no case where there was any evidence whatsoever in the record negativing defendants' liability or indicating contributory negligence by plaintiff, could an appellate court set aside the ruling of the lower court in denying a new trial for inadequacy of damages.

Respondents contend, however, that if there is any evidence whatever that would support a finding of nonliability, the appellate court must assume that the lower court denied the motion for a new trial upon the grounds of such nonliability. In support of this contention, they cite a number of cases, which do not so hold. In Green v. Soule, 145 Cal. 96, 78 P. 337, 340, and Wulbern v. Gilroy Express, 116 Cal. App. 222, 2 P.(2d) 508, the court was not dealing with the questions arising from a claim of inadequacy of the verdict, but in cases based upon the action of the trial court in determining motions for new trial upon the questions of liability alone.

Although the court in Lambert v. Kamp, supra, in discussing this matter, said that the question was "not whether the judgment is so inadequate as to warrant this court in sending the cause back for a new trial, but, rather, did the trial court err in denying appellant's motion for a new trial" and in determining "whether the complaining party was entitled to recover anything at all," still the court did not discuss conflicts in the evidence or whether or not there was any conflict in the evidence, but said that the record was such "as to justify the trial court in concluding that the party asking for a new trial had *totally failed* in his primary proof of negligence." (Italics ours.) This statement is of little value in our case where the evidence, viewed in one aspect, fully supports primary proof of negligence, but such evidence is in conflict when viewed from the opposite aspect. Certainly no one could contend that where the evidence fatally fails to prove negligence, the question of damages, either adequate or inadequate, is material as damages must be predicated upon negligence.

Even in Green v. Soule, supra, in discussing the general rule as to the duty of the lower court in passing upon motions for new trial, the court uses the language "if the judge * * * is convinced that it [the verdict] is *clearly* against the weight of the evidence," he should grant a new trial. (Italics ours.) But in our case the court refused to grant a new trial even though the damages were grossly inadequate, and in our determining whether or not he should have granted the new trial, we cannot say, by reason of the conflict in the evidence, that the verdict upon the question of liability is *clearly* against the evidence. We can say that on the question of damages it clearly is, and that on the question of liability there is ample support in the evidence.

In the case of Caulfield v. Market Street Railway Company (Cal.App.) 66 P.(2d) 752, the court, in determining an appeal by the plaintiff from an order denying her motion for new trial upon the grounds of

the inadequacy of the damages awarded her, answered the same contention of the defendants there as made by the defendants here, by saying: "Nor, as urged by the defendants, does it follow from the order denying the motion for a new trial that the trial court was of the opinion that the evidence was insufficient to prove negligence. * * * There was sufficient evidence on the latter issue to go to the jury, and their conclusion is fairly supported."

[8] Taking first the evidence upon the question of the defendants' negligence, this evidence was directly contradictory. The jury found in favor of the appellant on this question. There is plenty of evidence in the record to justify a holding either way upon this question. Whichever way a jury might find upon this question, no trial or appellate court would be justified in holding that there was not evidence to support it. The solution of this question depends to a large extent upon which set of witnesses one is going to believe. The following is some of the evidence establishing the defendants' negligence: The motorman in charge of the street car involved in the collision testified that he did not look to his right (the direction from which the fire engine entered the intersection and where his view would be unobstructed for at least 200 feet), at the time he entered the intersection or at any other time until he reached its center. At least thirteen witnesses testified that the street car proceeded forward into the intersection while the traffic signal was set at "stop." An ordinance of the city and county of San Francisco required street cars to obey these traffic signals, although fire apparatus answering an alarm, as was the case here, was expressly exempted therefrom. While the motorman claimed he did not hear the siren or bell of the oncoming apparatus, thirty-seven witnesses testified to their being sounded, and two of these witnesses were passengers in the street car. The motorman of another street car at the scene of the accident heard the rumble of the approaching apparatus. The speed of the street car was limited by ordinance to 15 miles per hour at the intersection. Two disinterested witnesses testified that the car was proceeding across the intersection at a speed of 25 miles per hour, or more. Thus, considering the evidence as a whole, in view of the finding of the jury upon closely disputed questions of fact, it cannot be said that it clearly establishes the fact that defendants were not guilty of negligence.

Now, upon the question of the contributory negligence of the plaintiff: This depends upon, first, whether or not the driver of the fire truck was negligent, and, secondly, whether or not such negligence, if any, is imputable to appellant. Upon the first of these questions there was a sharp conflict of evidence. It cannot be said that the evidence considered as a whole was of a character to clearly establish the fact that the driver was guilty of negligence. Here again the question depends to a large extent upon which set of witnesses one is to take, bearing in mind, of course, that the jury saw the witnesses and found that the driver was not negligent. As stated before, there were 37 witnesses who testified that the siren and bell upon the fire engine were sounded; some of the witnesses testified that the speed of the apparatus did not exceed 15 miles per hour at the intersection. Even though its speed were in excess of that figure, speed alone is not negligence.

[9, 10] But assuming that the driver was negligent, was this imputable to the appellant? No defense of imputed negligence was pleaded in this case. It therefore cannot be considered. "Imputed negligence, like contributory negligence, is a matter of defense. If the relationship between the driver of the vehicle and the plaintiff was such that his negligence would be imputable to her and bar her recovery, the burden was upon defendants to *allege* and prove such relationship. Plaintiff was not required to anticipate defenses." Bennett v. Chanslor & Lyon Co., 204 Cal. 101, 105, 266 P. 803, 804. (Italics ours.) Incidentally, the only evidence of joint or common operation of the fire truck by plaintiff and the driver contended for by respondent, is that it was the duty of the plaintiff to ring the bell, sound the siren, and watch ahead for traffic. In Adler v. Metropolitan St. Ry. Co. (Sup.) 84 N.Y.S. 877, relied upon by respondents, plaintiff and the driver of a fire patrol were both employed by the board of fire underwriters; he was sitting upon the same seat with the driver, ringing the bell, and was engaged in common employment with the driver, when the fire patrol and a street car collided, injuring the plaintiff. The court held that it could

not be said as a matter of law that the negligence of the driver was or was not imputable to the plaintiff in that case. It being, then, a question for the jury, the latter has, in the case at bar, decided that the plaintiff did not have such control over the driver as to make his negligence imputable to plaintiff. As said in Ring v. Minneapolis St. Ry. Co., 173 Minn. 265, 217 N.W. 130, 131: "The plaintiff had no control over the fire truck; he had no authority over the driver of the truck and had nothing to say as to where it should go or how it should be driven or operated. The element of joint control was wholly lacking. The driver of the fire truck was selected by * * * the captain of the fire company. * * * He went upon the truck, not in pursuance of any enterprise or undertaking of his own, but pursuant to orders and regulations of the fire department and of his superiors. Negligence in the conduct of another will not be imputed to a party if he neither authorized such conduct, nor participated therein, nor had the right or power to control it." This is true in the instant case, even though the appellant and the driver were both hosemen and alternated in the driving of the truck. There is no evidence that when one was driving the other had the right of control of the driver. Moreover, in order for the negligence of one to be imputed to the other there must be some relationship between them as to cause the application of the maxim, "Qui facit per alium facit per se." Bryant v. Pac. El. Ry., 174 Cal. 737, 742, 164 P. 385. "There is usually some relation between persons on a joint enterprise, such as partnership, principal and agent, master and servant, or some other kindred identity in order to constitute such community of enterprise and joint control over the operation of the automobile." 4 Blashfield Cyclopedia of Automobile Law and Practice (Permanent Edition) p. 615.

Respondents contend that the negligence of the driver can be imputed to the other even though there be no contractual relation of principal and agent, master and servant, or some such relationship existing between them, and cites a number of cases to support this view, such as Stewart v. San Joaquin Light & Power Co., 44 Cal. App. 202, 186 P. 160; Dowd v. Atlas T. & A. Service, 187 Cal. 523, 202 P. 870; and others. However, an examination of these cases discloses that respondents are confusing two different rules of law. One, the doctrine of imputed negligence is as above set forth; the other is the question of plaintiff's own contributory negligence. This is exemplified by a guest in a car watching the driver take him into a known peril and doing nothing about it in the way of warning or objection, or where the passenger knows that the driver is doing something negligent but sits idly by making no effort to persuade the driver to cease the negligent act. There, it is not a case of the driver's negligence being imputed to the other, but is a case of the other being himself negligent, in which case, of course, he cannot recover. Any passenger in an automobile is bound to use ordinary care for his own safety, and if he fails to do so he is guilty of negligence himself. So here, the driver's negligence is not imputable to plaintiff, but if plaintiff was himself negligent in failing to warn the driver within a reasonable time of the discovery by him of danger, such negligence would be included within the defendant's plea of contributory negligence. Respondents ardently urge that the plaintiff was negligent in this respect, but here, again, it cannot be said that the evidence clearly shows that plaintiff was guilty in this respect. There is some evidence, possibly, upon which it could be said that such was the case, but on the other hand there is just as great weight of evidence to the contrary. So that it cannot be said as a matter of law that appellant was guilty of contributory negligence.

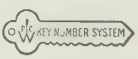
[11, 12] The plaintiff has requested a new trial upon the issue of damages alone. He is entitled to such new trial upon that issue, but the question of limiting it to that issue alone is a very serious one. A limited new trial should not be granted, where substantial justice requires that a new trial, if granted at all, should cover all the issues. Donnatin v. Union Hardware & Metal Co., supra, 38 Cal.App. 8, at page 12, 175 P. 26, 27, 177 P. 845. The verdict of the jury which found, in effect, that defendants were guilty of negligence and that plaintiff was free from contributory negligence and yet allowed damages which were grossly inadequate, furnishes convincing proof as said in the Donnatin Case, supra, page 11 of 38 Cal.App., 175 P. 26, 177 P. 845, "that in order to reach an agreement the verdict was the result of unwarranted concessions of convictions made by each of two opposing factions of the jury, one of which conscientiously

believed that defendant should prevail in the action, and the other equally conscientious in the opinion that plaintiff should recover damages commensurate with the injuries sustained. It is apparent, we think, that those jurors entertaining the opinion that defendant was not guilty of the negligence charged [or, in our case, the additional issue that plaintiff was guilty of contributory negligence], "nevertheless agreed to surrender their views in consideration of other jurors consenting to the trifling award made. * * * It would work a grave injustice upon defendant to force it to a new trial of the issue as to damages only, with the issue as to liability, upon which no verdict other than in name had been rendered, forever closed against any inquiry." Just how much the jury was influenced by the instructions upon imputed negligence it is impossible to say. It may well be that the jury did not believe there was any contributory negligence upon the part of the plaintiff, but some jurors might also have believed under the evidence that the driver of the apparatus was negligent and that his negligence as a matter of law should be imputed to plaintiff, and in this mistaken belief they might have surrendered their convictions as to the amount of damages they should award. On the other hand, it is possible under the evidence that some of the jurors believed that the driver was negligent and that plaintiff contributed proximately to the accident by, with knowledge of such negligence on the part of the driver and of the conditions constituting such negligence, failing to warn the driver or persuade him to stop or slow up, and such jurors surrendered their convictions in this behalf in exchange for a verdict for low damages. In view of this uncertainty and the fact that clearly something other than the evidence on the question of damages must have actuated the jury, or some of them in arriving at such a low verdict, substantial justice requires that (as said in the Donnatin Case, supra, 38 Cal.App. 8, at page 11, 175 P. 26, 27, 177 P. 845), "* * * what is a just compensation the plaintiff should receive, if he is entitled to recover at all, can best be determined by trying the whole case before one judge and one jury instead of 'splitting it up' between different judges and different juries."

Inasmuch as the case is to be tried over again, it becomes unnecessary to discuss the other assignments of error made by the appellant.

The judgment is reversed, and the cause remanded for a new trial upon all issues.

We concur: TYLER, P. J.; KNIGHT, J.



20 Cal.App.2d 495

TOULI et ux. v. SANTA CRUZ COUNTY TITLE CO. et al.

Civ. 10454.

District Court of Appeal, First District, Division 2, California.

April 23, 1937.

Hearing Denied by Supreme Court June 21, 1937.

1. Trusts ⇐59(1)

Statute providing for revocation of trust *held* to refer only to voluntary trust created without valuable consideration passing to trustor, and not to authorize revocation of deed of trust given as security for payment of an obligation (Civ.Code, §§ 2216, 2250, and § 2280, as amended by St.1931, p. 1955).

"Voluntary" means acting, or done, of one's own free will without valuable consideration; acting, or done, without any present legal obligation to do thing done. "Revoke" means to call back and is synonymous with "rescind," "to recall," and "to cancel," and does not mean "repudiation."

[Ed. Note.—For other definitions of "Revoke; Revocation" and "Voluntary," see Words & Phrases.]

2. Mortgages ⇐8

Deed of trust securing an obligation, as distinguished from voluntary trust, is created for benefit of trustor and named beneficiary.

3. Mortgages ⇐8

Fact that deeds of trust to secure performance of obligations are treated in same sections with mortgages *held* to indicate that such deeds of trust are different from deeds of trust created for benefit of another than trustor (Civ.Code, § 2250 et seq.; § 2924 et seq.; § 3265; Code Civ.Proc., §§ 692, 694; Probate Code, §§ 830, 1538).

4. Statutes ⇐181(2)

Construction of statute consisting of sound sense, wise policy, and fair practice is to be preferred to one inevitably leading to absurdity, dishonor, and fraud.

5. Equity ⇐66

Party refusing to do equity is not entitled to relief in equity court.

6. Cancellation of instruments ⇐24(2)

Trustors *held* not entitled to revoke deed of trust securing note where they had failed to pay note and had not offered to restore any part of consideration received by them (Civ.Code, § 1689 et seq.; § 1691, subd. 2).

Appeal from Superior Court, Santa Cruz County; James L. Atteridge, Judge.

Suit by Charles L. Touli and wife against the Santa Cruz County Title Company, A. A. Koch, and others. Judgment for plaintiffs, and named defendants appeal.

Reversed.

Frederick W. Docker, of Fresno, and George G. Graham, of Santa Cruz, for appellant A. A. Koch.

Harry J. Bias and W. A. Deans, both of Santa Cruz, for appellant Santa Cruz County Title Co.

Stoney, Rouleau, Stoney & Palmer, and Royal E. Handlos, all of San Francisco, for other appellants.

Wyckoff, Gardner & Parker, of Watsonville, for respondents.

Allard, Holbrook & Whyte, and Joseph A. Allard, Jr., all of Pomona (Edward D. Landels, of San Francisco, of counsel), for amicus curiæ California Building & Loan League.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, for amicus curiæ California Bankers' Ass'n.

NOURSE, Presiding Justice.

Plaintiffs sued in equity to declare a deed of trust revoked, to require the trustees to reconvey, and to restrain the enforcement of the deed and the sale of the real property covered by it. The defendants answered separately, alleging that the note which the deed secured had not been paid, that both were executed on November 15, 1933, the deed to secure a loan of $7,500, and that no payments thereon had been made since October, 1934. The defendant Koch pleaded specially that the original payee of the note sold to one Turner, who then sold to this defendant; that before the last sale the plaintiffs herein warranted and assured this defendant that it was the intention of the parties at the time of the execution of the documents to make the deed security for all its several terms until final payment had been made upon the obligation; and that it was the purpose of the plaintiffs to carry such intention into effect. It was further alleged that the defendant title company accepted the trusteeship under the deed as a matter of business with the purpose of carrying out the terms thereof and not as a matter of personal confidence. From the complaint it appears that notice of default was duly given on February 26, 1935, and that the plaintiffs followed this with a written notice of revocation of the trust on March 30, 1935. Upon these pleadings the plaintiffs moved for judgment. The motion was granted and judgment was entered decreeing that the trusts were terminated by the notice of revocation, that the trustee be required to reconvey and that the defendants should be permanently restrained from selling any of the property covered by the trust deed.

The judgment must be reversed for these reasons:

[1] (1) Section 2280 of the Civil Code, which permits the revocation of a trust "unless expressly made irrevocable by the instrument" relates only to a "voluntary" trust created without a valuable consideration passing to the trustor, and does not apply to a deed of trust given as security for the payment of an obligation. This follows from a consideration of the legislation as a whole. The original section was based on Field's Draft of the New York Civil Code, section 1209, and was enacted in 1872 when a deed of trust such as that involved here was "both in legal effect and in theory" deemed to be a mortgage with a power of sale and differed "not at all from a mortgage with a power of sale." Bank of Italy Nat. Trust & Sav. Ass'n v. Bentley, 217 Cal. 644, 654, 20 P.(2d) 940, 944. The expression "voluntary" trust was first used in the section when it was redrafted by the amendment of 1931 (St.1931, p. 1955). At that time the distinction between an ordinary express trust and the common deed of trust given as security for an obligation was clearly defined in the California decisions and was well known to the lawmakers. A voluntary trust was defined in section 2216 of the Civil Code as "an obligation arising out of a personal

confidence reposed in, and voluntarily accepted by, one for the benefit of another." But this section was also enacted in 1872 and was based upon Field's Draft of the New York Civil Code, and hence the Legislature could not have had in mind a trust identical to "a mortgage with a power of sale." Webster's New International Dictionary under the heading "voluntary-law" gives this definition: "Acting, or done, of one's own free will without valuable consideration, acting, or done, without any present legal obligation to do the thing done." It was in the latter sense that the word "voluntary" was used in the amended section, otherwise it would not have been coupled with the word "rovocable" without reservation. The word "revoke" literally means to "call back." It is synonymous with "rescind," "to recall," and "to cancel." It does not mean "repudiation." A deed of trust given to secure an obligation is a contract, the right to rescind which is granted and limited by express provisions of the Civil Code to which we will hereafter refer. It must follow, therefore, that when section 2280 was drafted to permit the revocation of a "voluntary" trust, that expression was not used in the broad sense found in section 2216, but in the restricted sense of a trust created freely and without a valuable consideration or legal obligation. Otherwise the Legislature would have restricted the revocation, or rescission, to the general equitable safeguards placed upon mortgages and contracts in general.

[2] This view is fortified by a consideration of the structure of the code in which these sections appear. Section 2280 is a part of article 5 of chapter 2 of the title on trusts. Section 2250, which is in article 1 of that chapter, reads: "The provisions of this chapter apply only to express trusts, created for the benefit of another than the trustor, and in which the title to the trust property is vested in the trustee; not including, however, those of executors, administrators, and guardians, as such." A deed of trust such as we have here is created for the benefit of the trustor and the named beneficiary. Humboldt Savings Bank v. McCleverty, 161 Cal. 285, 290, 119 P. 82; Ainsa v. Mercantile Trust Co., 174 Cal. 504, 510, 163 P. 898; Atkinson v. Foote, 44 Cal.App. 149, 156, 186 P. 831; Kellum v. San Mateo County Title Co., 127 Cal. App. 276, 279, 15 P.(2d) 876; 25 Cal.Jur. pp. 11, 12, 42. The author in California Jurisprudence at page 11 correctly concludes that the ordinary deed of trust "is not, therefore, governed by the chapter of the Civil Code beginning with section 2250, as that refers to those trusts which are entirely for the benefit of third persons, wherein the title wholly passes to the trustee, there being nothing to be done for the benefit of the trustor—nothing left in or to be returned to him." Hence, a deed of trust given as security for an obligation is not a trust "created for the benefit of another than the trustor," but is one created for the benefit of the trustor as well as for the benefit of the named beneficiary.

[3, 4] (2) The Legislature must have had in mind numerous decisions relating to the nature and legal effect of deeds of trust of this kind and the holdings that, except for the passage of title for the purpose of the trust, such deeds are practically and substantially only mortgages with a power of sale, and that they differ from mortgages in that title actually passes to the trustee, whereas, in the case of mortgages a lien only is created. These cases are reviewed in Bank of Italy Nat. Trust & Sav. Ass'n v. Bentley, 217 Cal. 644, 20 P.(2d) 940, and further citation here is not necessary. It is sufficient that the similarity of mortgages and deeds of trust of this nature was well known to the lawmakers, and that the fundamental difference between such deeds of trust and those trusts referred to in section 2250 et seq. of the Civil Code was equally well known. We draw this deduction from the fact that throughout the Codes the latter are referred to and treated separately as "trusts," whereas, the former are referred to as "deeds of trust" or trusts "to secure the performance of an obligation" and are treated in the same sections with mortgages. Civ.Code, § 2924 et seq., § 3265; Code Civ.Proc., §§ 692, 694; Probate Code, §§ 830, 1538. No reason is apparent why a debtor under a deed of trust should be permitted to destroy the lien securing his debt while the same privilege is not given to the debtor under a mortgage. If section 2280 is susceptible of the construction urged by respondents, then such construction would inevitably lead to absurdity, dishonor, and fraud. Such construction is not to be preferred to one "consisting of sound sense and wise policy," and fair practice. In re Haines, 195 Cal. 605, 613, 234 P. 883.

[5, 6] (3) The judgment is condemned by the uniform rule that one is not entitled to relief in a court of equity who refuses to do equity on his part. In Shimpones v. Stickney, 219 Cal. 637, 649, 28 P.(2d) 673, 678, it is said: "It is settled in California

that a mortgagor cannot quiet his title against the mortgagee without paying the debt secured. See a long list of cases sustaining the equitable rule as variously applied collated in 10 Cal.Jur., p. 512 et seq. It was clearly erroneous to quiet her title under the circumstances of her refusal to do equity." The plaintiffs admittedly failed to meet their obligation in the transaction, and made no offer to pay the amount due. They sought and obtained judgment revoking and terminating the trust deed, requiring a reconveyance of full and clear title to the property, and had an injunction restraining enforcement of the lien. All this was had without any offer to restore any part of the consideration received by them. The effect of the judgment is much the same as the decree quieting title in the Shimpones Case. It is contrary to the accepted principle that he who seeks equity must do equity. It is also contrary to law. The deed of trust is a contract wherein mutual obligations are imposed upon the trustor, the trustee, and the beneficiary. If section 2280 could be applied on any theory to such a deed of trust, the revocation permitted by that section is nothing more than a rescission of this contract. As such, it is controlled by the provisions of section 1689 et seq. of the Civil Code and particularly by the provisions of section 1691, subd. 2, declaring that the actor must "restore to the other party everything of value which he has received from him under the contract."

The judgment is reversed.

We concur: STURTEVANT, J.; SPENCE, J.



20 Cal.App.2d 554

KAUPKE v. LEMOORE CANAL & IRRIGATION CO.

Civ. 1812.

District Court of Appeal, Fourth District, California.

April 26, 1937.

Hearing Denied by Supreme Court June 24, 1937.

1. Contracts ⇐173
Waters and water courses ⇐257(1)

Where each member of water association had continuing right at any time to an amount of water dependent upon total flow of river at time of delivery, but water assessments were levied at fixed time and in definite amount for overhead and operating expenses of association, obligations of parties were independent, and water master's alleged failure to deliver water and to prosecute lawsuits was no defense to his action to collect delinquent assessments, even though such alleged defenses might have been set up by way of counterclaim.

2. Limitation of actions ⇐163(6)

Where last payment on open book account was on November 7, 1932, action on account filed July 19, 1934, *held* not barred by limitations.

Appeal from Superior Court, Fresno County; J. J. Trabucco, Judge.

Action by Charles L. Kaupke, as treasurer of the Kings River Water Association, against the Lemoore Canal & Irrigation Company. Judgment for plaintiff, and the defendant appeals.

Affirmed.

See, also, 7 Cal.App.(2d) 362, 46 P.(2d) 204.

H. Scott Jacobs, of Hanford, and Edward T. Houghton, of San Francisco, for appellant.

Conley, Conley & Conley, of Fresno, for respondent.

MARKS, Justice.

This is an appeal from a judgment whereby plaintiff recovered from defendant $4,162.75 principal, together with interest and attorneys' fees.

Plaintiff is water master under provisions of the contract dated May 3, 1927, signed by defendant and eighteen other corporations and irrigation districts. This contract defined the rights of the signers, except the Foothill Irrigation District, in waters of the Kings river and is called "Water Right Indenture." The Foothill Irrigation District, while it executed the instrument, seems to have asserted no rights under it.

This water right indenture fixed the number of second feet of the flow of the river to which each signer was entitled, based on the number of second feet of the total flow of the river to which all of the signers were entitled, and which would vary with the actual flow of the river. It did not attempt to apportion all the flow of the river as others, not parties to this

agreement, had rights to some of the water. What is called an administrative agreement was executed by the same parties and forms the basis of this action, while certain provisions of the water right indenture furnish the grounds of special defenses interposed to it.

The administrative agreement refers to the water right indenture and by reference incorporates within its terms what is called the "Kings River Monthly Diversion Schedule" which sets forth in detail the number of second feet of the flow of the river to which each of the eighteen signers is entitled, varying with the months and the total flow of the river. It forms what is called the "Kings River Water Association," composed of the signers of the agreement. It creates the "Board of Directors of the Kings River Water Association" to be composed of one representative from each member irrigation district and corporation. It also provides for an executive or managing committee and a water master.

The administrative agreement contains the following provisions: "That said association, acting by and through its Board of Directors, shall have and is hereby granted control and supervision over the waters of said Kings River and over the flow and diversion thereof to the extent in said Schedule provided, and said Association acting by and through its said Board of Directors, shall cause the water which each of the parties hereto is so entitled to divert from said Kings River to be turned to it at the times, in the quantities and in the manner provided in said Schedule, and to protect and defend the said rights and interests respectively of all the parties hereto in and to the waters of said River, and in and to the diversion and use thereof under said Schedule; * * * it being expressly understood and agreed that it shall be the duty of said Association and of its Board of Directors and of any person whom it may employ as a Water Master, to protect to the fullest extent the rights of all the parties hereto in the particulars aforesaid and to prevent the invasion of the respective rights of the parties hereto, and to prevent the diversion and appropriation by others not parties hereto of the waters of said River to which the parties hereto are respectively entitled under said Schedule, and to report promptly to each of the parties hereto any and all invasions of and interferences with their said respective rights, and to take prompt and effective measures to protect said respective rights and prevent all invasions thereof. * * * Said Board shall make an estimate of the probable cost of conducting the business of said Association until the month of March next following the date of such organization, and it shall in the month of March of each year thereafter make a like estimate of the probable cost of conducting the business of said Association for the year next following the date of such estimate; and that each such estimate shall include all indebtedness contracted during the previous year which said Association may not have had the means to pay, and said Board of Directors acting by or through its Secretary or Treasurer shall make a demand or requisition upon each of the parties hereto for its proportionate part of such estimate, or its proportionate part of any instalment of such estimate, provided said Board of Directors shall require, (and it shall have the right to so require) the payment of its estimates to be made in instalments, and each of the parties hereto shall immediately be and become liable for and hereby agree and binds itself to pay within sixty (60) days after such demand or requisition to the Treasurer of said Association its part of such estimates or instalment thereof; * * *"

Then follows a schedule showing the percentage of such assessments to be paid by each member with the provision that each member shall become liable to and shall pay its assessment to the treasurer of the association who may sue to collect any delinquent assessment, besides interest, and reasonable fees for the services of his attorneys. In case of litigation it is also provided that assessments be levied and paid by the members, or in certain cases, only the members directly interested, to defray the expenses of the litigation.

The complaint alleges that various assessments were levied on the members of the association; that the members were regularly notified of them; that defendant failed to pay some of them either in whole or in part. Judgment is sought for the unpaid balance of the assessments together with interest and attorneys' fees.

The answer puts in issue certain of the allegations of the complaint which are not now urged here and may be considered abandoned. The defenses with which we are concerned are three; breach of con-

tract in failing to deliver to defendant the water to which it was entitled under the Kings River Monthly Diversion Schedule; failure to protect the rights of defendant to its water by failing to prosecute an action enjoining another water user from interfering with such rights by the appropriation of part of such water; the plea of the statute of limitations.

The trial court found in great detail that all the allegations of the complaint were true; that there had been no breaches of the contract in the particulars specified; that no part of plaintiff's cause of action was barred by the statute of limitations.

[1] The divergence of opinion between plaintiff and defendant arises over the proper construction to be placed on the provisions of the water right indenture and the administrative agreement. If the obligation to make the payments and the obligation to deliver water and to prosecute or defend lawsuits were mutually dependent covenants or conditions, and the consideration for the payments was delivering the specified amount of water and prosecuting or defending the lawsuits, the failure to deliver the water or to prosecute or defend a lawsuit could be pleaded as a special defense. If, on the other hand, the obligations were independent one from the other and were separate and distinct, then the breach of the obligation to furnish water or to prosecute or defend lawsuits would constitute no proper defense in an action to recover unpaid assessments, although the damages suffered might be set up by way of counterclaim or cross-complaint. Fresno Canal & Irrigation Co. v. Perrin, 170 Cal. 411, 149 P. 805, 807; Consolidated Irrigation Dist. v. Crawshaw, 130 Cal.App. 455, 20 P.(2d) 119; Madera Canal & Irrigation Co. v. K. Arakelian, Inc., 103 Cal.App. 592, 284 P. 971.

In the case of Fresno Canal & Irrigation Co. v. Perrin, supra, it is said:

"The plaintiff contends that the admitted fact that the defendant has failed to make the annual payments thereon precludes her from relief by way of damages for the alleged failure of plaintiff to furnish water as the agreement required. By the terms of the agreements, the annual payments were to be made on the first Monday of September of each year and, in case of default thereon for 30 days, the plaintiff, at its option, might terminate the agreement. The evidence shows that the plaintiff did not avail itself of this option, but that, on the contrary, it treated the agreements as still in force and continued thereafter to deliver some water in pursuance thereof, as before, and to recognize the contracts as obligatory upon itself. It claimed that it had delivered all the water demanded. If it were conceded that the covenant of the plaintiff to furnish water and that of the defendant to make the annual payments were dependent, or that the annual payment was a condition precedent to the furnishing of the water, we think this conduct of the plaintiff would operate as a waiver of its rights to terminate or avoid the contract for failure to pay the annual installments, so far as it affected the right of the defendant to demand and receive water thereafter and to claim damages for the failure of the plaintiff to furnish it. Los Angeles, etc., Corp. v. Amalgamated Oil Co., 168 Cal. [140] 143, 142 P. 46; Cincinnati, etc., Co. v. Baker, 130 Ill.App. [414] 416.

"But the covenants are not dependent or concurrent. The water was to be furnished, when wanted, continuously from February 19, 1897, to February 16, 1921, while the payments were to be made annually as aforesaid. The furnishing of the water for the first six months could not be dependent upon or concurrent with the payment to be made in the following September. The same would be true of each succeeding year, upon the plaintiff's election not to terminate the agreements by reason of the failure of the defendant to pay. Where the covenants of the respective parties are to be performed at different times they are held to be independent and the breach by one party of his covenant does not excuse the performance by the other of his covenant or relieve him of liability for damages for a breach thereof. Southern Pac. R. Co. v. Allen, 112 Cal. [455] 461, 44 P. 796; Front St. M. & O. R. Co. v. Butler, 50 Cal. [574] 577; Bank of Woodland v. Duncan, 117 Cal. 412, 49 P. 414; Deacon v. Blodget, 111 Cal. [416] 418, 44 P. 159. Upon these facts, the most that the plaintiff can claim on account of the failure of the defendant to make the payments is the right to recover the same and to have the amount thereof set off pro tanto against such damage as the defendant has shown from the failure of the plaintiff to deliver water."

We are of the opinion that the foregoing holding of the Supreme Court is controlling here. The water of the Kings river to be apportioned and diverted by the

water master was not the water of Kings River Water Association, but the water of its several members. Each member had the right to its water and the right to receive it at any time during any year, the quantity depending on the total flow of the Kings river and the month in which delivery was made. The right to receive water was a continuing one, as was the obligation to measure and divert it. Assessments were levied once each year and were usually made payable in two installments at fixed times and in definite amounts. The payments were not made for the water but for what may be termed the overhead and operating expenses of the Kings River Water Association. Defendant in paying its assessments was not paying for water. It owned its water and did not have to purchase it. It paid for services rendered by the Kings River Water Association. The payments were periodical. The obligation to measure and divert water was continual. Under the authorities cited, we must conclude that: "the furnishing of the water * * * could not be dependent upon or concurrent with the payment to be made"; that "the covenants are not dependent or concurrent"; and that as the "covenants of the respective parties are to be performed at different times they are held to be independent and the breach by one party of his covenant does not excuse the performance by the other of his covenant or relieve him of liability for damages for a breach thereof." Fresno Canal & Irrigation Co. v. Perrin, supra.

The same reasoning applies to the covenant to prosecute or defend lawsuits. So doing is not a condition precedent to the obligation of defendant to pay its assessments. In fact it is clear that the ordinary assessments are to pay the ordinary expenses of the Kings River Water Association. It is also clear that assessments levied to pay the expenses of any litigation are not contingent in their nature. They are to be paid in order to enable the association or part of its members to prosecute or defend lawsuits. The services may be rendered in the future. The assessments may be levied to meet the cost of future services and are not limited to the payment for services concurrently performed or fully rendered.

If, as we believe, the three cases cited are controlling here, the special defenses we are considering are not available to defendant in the action to collect delinquent assessments, where, as here, damages for alleged breach of contract are not asserted by way of counterclaim or cross-complaint. The findings on those defenses were not responsive to any issue material to the case. It follows that those findings may be disregarded and may be treated as surplusage. Therefore, we are not required to examine the record to determine the sufficiency of their evidentiary support. Nor are we required to construe the two contracts in question here to determine whether defendant is entitled to its quota of water measured at the measuring station near Piedra subject to depletion or increment during its flow down the river or whether its proportion of the water must be measured at the intake of its distributing system located about thirty miles down the river from Piedra. These issues cannot be decided under the pleadings in the present case.

[2] The final question raised by defendant for our determination is the bar of the statute of limitations to portions of the items composing plaintiff's demand.

The trial court found under one cause of action of the complaint that defendant was indebted to plaintiff on an open book account with the last payment made by defendant on November 7, 1932. The action was filed July 19, 1934. In holding that under such circumstances the bar of the statute of limitations had not accrued, it has been said: "The account contained charges for services in 1923; the action was brought in January, 1932. Because many of the charges were more than four years old, appellant claims they were barred by the provisions of section 337 of the Code of Civil Procedure. His argument is to the effect that as each service was completed a cause of action arose for the recovery of compensation therefor and was barred four years thereafter if the charges were contained in a book account, otherwise in two years. This, we think, presents a theory in conflict with the decided cases. A book account was placed upon the same basis as a mutual open and current account by the 1917 amendment of section 337 of the Code of Civil Procedure. Furlow Pressed Brick Co. v. Balboa, etc., Co., 186 Cal. 754, 763, 200 P. 625; Bailey v. Hoffman, 99 Cal.App. 347, 278 P. 498. The statute commences to run from the date of the last entry in the account. Such is the settled law in this state. The cause of action is upon the account, not upon the separate charges which enter into

it. When, therefore, four years have run from the date of the last entry in the account, action on the entire account is barred, but the action is not barred piecemeal as to the several items, because in an action on the book account they are all to be regarded as a part of one entire account and cause of action." Egan v. Bishop, 8 Cal.App.(2d) 119, 47 P.(2d) 500, 502.

It is therefore apparent that none of the special defenses interposed by defendant can prevail in this action in the form in which they are pleaded.

The judgment is affirmed.

I concur: JENNINGS, J.

Mr. Presiding Justice BARNARD, being disqualified, does not participate herein.



22 Cal.App.2d Supp. 755

PEOPLE v. BEIFUSS.

SAME v. JOHNSON.

Cr. A-1400.

Cr. A-1404.

Appellate Department, Superior Court, Los Angeles County. California.

April 6, 1937.

1. Municipal corporations ⇐120

Ordinances are to be reasonably construed, and, so far as possible, are to be given a construction which will render them valid rather than void (Civ.Code, § 3542).

2. Municipal corporations ⇐594(2)

Ordinance providing that no person shall be on any private premises in a state of intoxication to the annoyance of any other person *held* not void for uncertainty, on ground that annoyance is a state of mind, and that ordinance sets up no standard for determining violation, since ordinance does not intend existence of annoyance to be ascertained solely by inquiry into actual state of mind of some other person present to witness defendant's intoxication, but intends that matter be settled in accordance with mental reaction of a reasonable person.

3. Drunkards ⇐10

Ordinance providing that no person shall be on any private premises in a state of intoxication to the annoyance of any other person is not violated unless defendant's condition of intoxication and resulting conduct are such as to annoy a reasonable person, and another person present is in fact annoyed thereby.

4. Constitutional law ⇐83(1)

Ordinance providing that no person shall be on any private premises in a state of intoxication to the annoyance of any other person *held* not an arbitrary or unreasonable restriction of personal liberty, on ground that annoyance might arise from whim or fancy of some possibly unreasonable person, but a valid exercise of police power, since ordinance intends that matter of annoyance be settled in accordance with mental reaction of a reasonable person.

5. Drunkards ⇐11

Evidence that defendant, while in a very drunken condition, was in a rooming house, talked thickly in a loud and boisterous manner, cursed, used profane and obscene language, struck matches on woodwork and threw them on carpet, all in presence of landlady and her tenants, *held* to sustain conviction for violation of ordinance prohibiting a person from being on any private premises in a state of intoxication to the annoyance of any other person.

Appeals from Municipal Court of City of Los Angeles; Newcomb Condee and Le Roy Dawson, Judges.

Milton W. Beifuss and Mary Johnson were convicted of violating section 41.27, subd. (b) of the Los Angeles Municipal Code providing that no person shall be on any private premises or in any private house in a state of drunkenness or intoxication to the annoyance of any other person, and they appeal.

Judgment in each case affirmed.

Earl G. Read and Alvan M. Palmer, both of Los Angeles, for appellant Beifuss.

M. H. Broyles, of Los Angeles, for appellant Johnson.

Ray L. Chesebro, City Atty., Newton J. Kendall, Asst. City Atty., and John L. Bland, and Albert L. Hershman, Deputy City Attys., all of Los Angeles, for the People.

SHAW, Presiding Judge.

[1-3] In each of these cases the defendant has been convicted of violating section 41.27, subdivision (b) of the Los Angeles Municipal Code, and appeals from the judgment. This Code, adopted as an ordinance, appears to be a compilation of previously existing penal ordinances of the city of Los Angeles. Section 41.27 deals with the subject of intoxication, and subdivision (b) thereof reads as follows: "No person shall be on any private premises or in any private house in a state of drunkenness or intoxication to the annoyance of any other person."

This ordinance is attacked as unreasonable, oppressive, and uncertain, and for all these reasons void. As to uncertainty, it is argued that annoyance is a state of mind, that what annoys one person may not annoy another, and that consequently the ordinance sets up no standard by which it may be determined whether any particular conduct is in violation thereof, citing In re Peppers (1922) 189 Cal. 682, 209 P. 896, 898. But ordinances, like other acts of legislation, are to be reasonably construed. Civ.Code, § 3542; 23 Cal.Jur. 722, 723; Kipp v. Billingham (1933) 217 Cal. 527, 530, 20 P. (2d) 318. They are also, so far as possible, to be given a construction which will render them valid rather than void. Medical Finance Association v. Wood (Cal.Super.1936) 63 P.(2d) 1219. While annoyance is, partly at least, a mental condition, we think this ordinance does not intend the existence of an annoyance to be ascertained solely by an inquiry into the actual state of mind of some other person present to witness the defendant's intoxication. No doubt there must be such a person present; otherwise the defendant's intoxication would not be to the annoyance of another person. We say this because the theory of telepathy is not well enough established to be the basis of legislation; nor is it to be supposed that the city council which passed this ordinance was postulating a venture into the realm of transcendental cognition or others means of acquiring knowledge in absentia or ex post facto, by the person annoyed. But the matter of annoyance is to be settled in accordance with the mental reaction of a reasonable person. Unless the defendant's condition of intoxication and resulting conduct are such as to annoy a reasonable person, and another person present is in fact annoyed thereby, no violation of the ordinance appears. We find the proper criterion set up in the English case of Tod-Heatly v. Benham (1887) 40 Ch.Div. 80, 94. That case involved a covenant of a lease that the lessee would not do on the leased premises anything which might "grow to the annoyance, nuisance, grievance, or damage" of the lessor or the inhabitants of adjoining houses. Construing this part of the lease, Lord Justice Cotton said: "They [the judges] must decide not upon what their own individual thoughts are, but on what, in their opinion and upon the evidence before them, would be an annoyance or grievance to reasonable, sensible people; * * * It is not sufficient in order to bring the case within the words of the covenant, for the plaintiffs to show that a particular man objects to what is done, but we must be satisfied by argument and by evidence, that reasonable people, having regard to the ordinary use of a house for pleasurable enjoyment, would be annoyed or aggrieved by what is being done." Lord Justice Lindley said (at page 96 of 40 Ch.Div.): "Anything which raises an objection in the minds of reasonable men may be an annoyance within the meaning of the covenant. * * * more than some fanciful distaste, which would not be sufficient." Similar language was used by Lord Justice Bowen, the other member of the court.

Thus construed the ordinance is not within the rule of the Peppers Case, supra, relied on by appellant. There a statute (St.1921, p. 1239, § 10) prohibiting the shipment of oranges "when frosted to the extent of endangering the reputation of the citrus industry, if shipped" was condemned as setting up no standard by which a shipper could regulate his conduct and hence "too vague, indefinite and uncertain to form the basis of a criminal proceeding." But that statute is quite different from this ordinance as we construe it. The qualities or characteristics to which reputation should relate were not stated by the statute there in question, but were left to conjecture. Moreover, the reputation of the citrus industry would depend on the opinion of all sorts of persons, and might probably be affected or created in part by the unreasonable whims or fantasies of the moment which no one could anticipate. Here, however, upon the construction we have given the ordinance,

we have a standard of reason established. The ordinance is like the statute upheld in Ex parte Daniels (1920) 183 Cal. 636, 646, 192 P. 442, 21 A.L.R. 1172, where it was held that a law prohibiting the driving of automobiles at an unreasonable speed was valid and constitutional against the objection that it was too uncertain. The Daniels Case was cited with approval in Re Leach (1932) 215 Cal. 536, 544, 12 P.(2d) 3, 5, where it was held that the words "not offered to the public" used in excepting certain matters from the Corporate Securities Act did not make the penal provisions of that act fatally uncertain. See, also, People v. Yates (1931) 114 Cal.App.(Supp.) 782, 789, 298 P. 961, where this court held a penal statute requiring a father to furnish his child "necessary food," etc., was sufficiently certain, citing the Daniels Case. Further authority for sustaining this ordinance is found in People v. Associated Oil Co. (1930) 211 Cal. 93, 108, 294 P. 717, 720, where a statute, not penal but enforceable by injunction, which prohibited "unreasonable waste of natural gas" by the operator of an oil well, was upheld against attack on the ground that it was too uncertain to provide any standard of conduct, the court saying, "the standard of reason has been applied in many cases where certainty is less capable of measurement then in the present case. * * * Instances 'where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree,' are common."

[4] The attack on this ordinance as unreasonable and oppressive is largely based on the interpretation of the ordinance which we have rejected, that which would allow an annoyance to arise from the whim or fancy of some possibly unreasonable person. Upon our construction of the ordinance it is not an arbitrary or unreasonable restriction of personal liberty but is a valid exercise of the police power. See In re Cutler (1934) 1 Cal.App.(2d) 273, 280, 36 P.(2d) 441, also City of St. Joseph v. Harris (1894) 59 Mo.App. 122, 127, where an ordinance like this one was declared valid by reason of the inclusion in it of the "annoyance" clause, the court stating that drunkenness per se could not be prohibited.

[5] In the case of People v. Beifuss now before us, the defendant pleaded guilty, so no question arises as to the nature of the conduct necessary to constitute a violation of the ordinance. In People v. Johnson, there was evidence tending to show that the defendant was very drunk, and that while in that condition she was in a rooming house, talked thickly but in a loud and boisterous manner, cursed, used profane and obscene language, struck matches on the woodwork and threw them on the carpet, all of which was in the presence of the landlady and her tenants. The landlady testified that this conduct disturbed her very much. The trial court was fully justified in finding that this conduct would annoy a reasonable person and did annoy the landlady as well as the other persons present.

Other points made in these cases have been considered but afford no ground for reversal and do not require further discussion.

The judgment in each of the above-entitled cases is affirmed.

I concur: SCHAUER, J.

8 Cal.2d 624

CONNECTICUT GENERAL LIFE INS. CO v. JOHNSON, State Treasurer (two cases).

S. F. 15724, 15725.

Supreme Court of California.

April 26, 1937.

1. Insurance ⇐676

Business of reinsurance is but modification of ordinary insurance, and authorization to do reinsurance business in state is included in certificate authorizing insurance company to carry on any of general lines of insurance (Pol.Code, § 594).

2. Pleading ⇐214(5)

Demurrers admit all allegations of fact, but do not admit truth of conclusions of law.

3. Pleading ⇐214(5)

Allegation as to want of authority of insurance company to do reinsurance business in state constituted allegation of "conclusion of law" and was not admitted by demurrer (Pol.Code. § 594).

[Ed. Note.—For other definitions of "Conclusion of Law," see Words & Phrases.]

4. Constitutional law ⇐229(1), 283

Section of State Constitution under which tax was imposed on basis of reinsurance business done by insurance company authorized to transact life and accident and health insurance within state *held* not to violate Fourteenth Amendment of Federal Constitution, on theory that it permitted levying of tax against insurance company on account of franchise not granted to company or exercised by it in state, since certificate authorizing insurance company to carry on certain line of insurance includes authority to conduct reinsurance in that type of business (Pol. Code, § 594; Const.Cal. art. 13, § 14 (b), as amended in 1930; Const.U.S. Amend 14).

5. Constitutional law ⇐229(1)
Taxation ⇐37

Imposition of tax against insurance company on percentage of gross premiums received from its entire business including its reinsurance business *held* not to deny equal protection of law, as against contention that lesser tax was imposed on insurer not doing reinsurance business, since all companies accepting reinsurance business were required to pay at same rate (Pol.Code, § 594; Const. Cal. art. 13, § 14 (b), as amended in 1930; Const.U.S. Amend 14).

6. Taxation ⇐168

Insurance company authorized to do life, accident, and health insurance business within state was authorized to do reinsurance business in such classes of insurance, and company was liable for tax computed on its entire business, including reinsurance of risks within state (Pol.Code, § 594; Const.Cal. art. 13, § 14 (b), as amended in 1930; Const.U.S. Amend. 14).

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Two actions by the Connecticut General Life Insurance Company against Charles O. Johnson, as Treasurer of the State of California. From adverse judgments, plaintiffs appeal.

Affirmed.

Raymond Benjamin and Hartley F. Peart, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., Neil Cunningham, Deputy Atty. Gen., and James J. Arditto, of San Francisco, for respondent.

CURTIS, Justice.

These two actions, while appealed separately, have been argued together, and as they present the same identical question, they may and will be considered in one opinion. The only difference in the two actions is that in action S. F. No. 15724, the plaintiff seeks to recover taxes paid for the calendar year 1930, while in action S. F. No. 15725 recovery is sought for the year 1931. These actions differ in no material respect from the two actions bearing the same title and reported in 3 Cal.(2d) 83, 43 P.(2d) 278, except as to the years during which the taxes involved accrued. In our decision in those actions we held that the taxes paid by plaintiff which it sought to recover in those actions, were legally levied and collected and the plaintiff was not entitled to recover any portion of the taxes so paid by it. As to all the questions involved in those appeals which were discussed and decided therein, we adhere to the conclusions reached by us in that decision.

The present actions were pending at the time the former cases were decided. On the going down of the remittitur in the

former appeals, the plaintiff amended its complaints in the two instant actions by expressly pleading the Fourteenth Amendment to the Constitution of the United States and alleging that the assessment and levy of a tax against plaintiff on the basis of its reinsurance business transacted during the two years covered by the complaints in these actions violated the provisions of this section of the Federal Constitution.

There are set forth, in said amended complaints, three grounds upon which the plaintiff relies in support of its contention that the assessment and levy of said tax against it violated the Fourteenth Amendment of the United States Constitution. These grounds are now relied upon by the plaintiff in support of its appeals herein.

It is first contended that the state board of equalization in computing the tax upon the reinsurance business of plaintiff levied a tax on account of business not done in the state of California and on contracts executed wholly and performed entirely without this state. This contention was the basis of the plaintiff's argument upon the former appeals, and it was decided adversely to plaintiff. We see no good reason for restating our position upon this question as our former decision fully answers the present contention of plaintiff.

It is next contended that the computation of said tax upon the basis of reinsurance done by plaintiff is violative of said constitutional section, and is the taking of plaintiff's property without due process of law in that said tax is levied against plaintiff on account of a transaction and privilege not granted to plaintiff by the state of California and not exercised by the plaintiff within this state. Plaintiff alleges that the plaintiff during the years for which said tax was levied held a legal and valid certificate of authority issued by the officials of this state authorizing it to do and transact the business of life and accident and health insurance within this state. It further alleges that neither of these certificates of authority authorize plaintiff to transact in California any other type of insurance except the three types above mentioned, all of which are recognized as types of insurance under section 594 of the Political Code of the state of California.

This section of the Code was amended in 1933 (St.1933, p. 2241), and in 1935 (St. 1935, p. 496) the Insurance Code was adopted, which superseded section 594 of the Political Code classifying insurance business. As these amendments were subsequent to the years during which the taxes herein involved accrued, the present actions are governed by the provisions of section 594 of the Political Code prior to its amendment in 1933. Neither the amendment of 1933 nor the provisions of the Insurance Code change the law in any material respect, in so far as it applies to any point raised in these actions, from what it was prior to the year 1933. Section 594 of the Political Code provides for some twenty different classes of insurance for which certificates of authority may be issued in this state. No mention is made of reinsurance in said section as a separate class of insurance which may be carried on in this state. This does not mean that the business of reinsurance may not be carried on in this state. It may mean, however, that the business of reinsurance is included in the respective classes of insurance enumerated in said section of the Code. That is to say, that a certificate of authority to engage in the business of fire insurance includes the authority to engage in the business of fire reinsurance.

"Reinsurance contracts as a general rule involve no legal principles essentially different from those applicable to contracts generally, nor does the contract necessarily differ in form from original insurance. And reinsurance was a valid contract at common law and * * * has generally been regarded as a legitimate and valid contract; reinsurance now being generally practiced." Cyclopedia of Insurance Law, Couch, vol. 1, p. 65, § 44. Again, the same author makes the following statement: "An insurance company empowered 'to make contracts of insurance' or 'all kinds of insurance against losses by fire', may make a contract of reinsurance. * * * *" Volume 8, p. 7393, § 2258. We find the identical statement in Joyce on Insurance, volume 1, p. 345, § 115.

The case of New York Bowery Fire Insurance Company v. New York Fire Insurance Company of New York, 17 Wend. (N.Y.) 359, seems to be the foundation for the above statement quoted above from the works of the two well-known authors. In that case we find the question discussed as follows: "It is objected that these Companies had no authority under their charters of incorporation to enter into the contract of re-assurance. By the 6th section of the Act incorporating the plaintiffs, L. of 1832, p. 292, they have power 'to make contracts of insurance against loss by fire

of any houses or buildings whatsoever, and of any goods, chattels or personal estate whatsoever.' By the 6th section of the Act incorporating the Bowery Co., L. of 1833, p. 296, they have power 'to make all kinds of insurance against losses by fire, of any houses and buildings whatsoever; and also upon all goods, wares and merchandise whatsoever.' Re-assurance is but a modification of the contract of insurance, and is, I think, clearly included in the power of the plaintiffs 'to make contracts of insurance,' and of the defendants 'to make all kinds of insurance' against losses by fire."

[1-4] Section 594 of the Political Code enumerates all the different classes of insurance authorized to be transacted in this state. It does not mention reinsurance. If reinsurance business is not included within one or more of the different classes of insurance mentioned in this Code section, then there is no law in this state governing that class of insurance, and it might follow that that type of insurance business is not permitted in this state. In the adoption of the Insurance Code in 1935, the insurance law of the state was rewritten, and in many instances material changes were made therein. Yet in this latest legislative enactment on the subject, we find no mention made of reinsurance as a separate and distinct type from ordinary insurance although other references are made therein to the business of reinsurance. In fact, the Insurance Code follows verbatim the classification of the different classes of insurance enumerated in section 594, Political Code, prior to its repeal. It is hardly reasonable that the commission which framed the Insurance Code, and the Legislature which enacted the bill proposed by the commission into law, as well as section 594, Political Code, and its amendment, intended to leave the business of reinsurance without regulation in this state. The only reasonable conclusion to be drawn from their actions, as well as from the authorities cited above, is that the business of reinsurance is but a modification of ordinary insurance and is included in a certificate authorizing an insurance company to carry on any of the general lines of insurance mentioned in the statute. The plaintiff, therefore, cannot legally claim that during the times mentioned in the amended complaints in these actions, the certificates of authority issued to it to transact the business of life, accident, and health insurance, did not authorize it to do a reinsurance business in these three classes of insurance. It is true that plaintiff has alleged that it had no certificate of authority to transact reinsurance business in this state. While the demurrers admit all allegations of fact in the amended complaints, they do not admit the truth of conclusions of law. The allegation as to the want of authority of the plaintiff to do a reinsurance business in this state comes within this latter class of allegations and is not admitted by demurrer. The section of the Constitution of this state under which the tax was levied against the plaintiff is not therefore violative of the provisions of the Fourteenth Amendment of the Federal Constitution which prohibits the taking of property without due process of law in that it permits the levying of a tax against plaintiff on account of a franchise not granted to plaintiff or exercised by it in this state. As we have seen, plaintiff has enjoyed and exercised this franchise during the entire time involved in these actions.

[5] Plaintiff further claims that this section of the Federal Constitution is violated in that the tax officials of this state in computing the tax against the plaintiff, included its reinsurance business, and thereby denied to plaintiff the equal protection of the law. Plaintiff bases this claim upon its statement that under the law in force during the years mentioned, the rate of taxation against all persons and companies doing an insurance business was fixed at 2.6 per cent. of their gross premiums, and that by compelling plaintiff to pay a tax of 2.6 per cent. based upon gross premiums received by it, not only from its general insurance business but also upon its reinsurance business, such tax amounted to more than 5.6 per cent. of its gross premiums received from its general insurance business. Therefore, plaintiff claims that other insurance companies which transact business in this state but do not accept reinsurance business are only required to pay a tax equal to 2.6 per cent. of their gross premiums while plaintiff is required to pay a tax equal to 5.6 per cent. of its gross premiums. To state this proposition is to show its fallacy. Plaintiff is only required to pay a tax equal to 2.6 per cent. of its gross premiums received from its entire business which, of course, includes its reinsurance business. All other companies accepting reinsurance business pay at the same rate, and companies which do not accept reinsurance pay the same tax based upon the business transacted by them. There is, therefore, no dis-

crimination against the plaintiff as it is taxed at the same rate at which others engaged in a similar business are taxed.

[6] Article 13, section 14(b), of the Constitution of this state permits a deduction of reinsurance premiums from the amount of the gross premiums received by an insurance company doing business in this state, for the purpose of computing the amount of taxes to be paid by said company. The evident purpose and intent of this provision of the Constitution are to avoid double taxation without any loss of revenue to the state. This deduction can only be made when the company which reinsures is "authorized to do business in this state." We have shown that the plaintiff was during the years herein involved, authorized to do not only a life, accident and health insurance business, but a reinsurance business in this state. Plaintiff's business in reinsurance clearly came within the terms of the constitutional section which permitted a deduction from gross premiums of premiums paid for reinsurance. Plaintiff undoubtedly received a benefit from this deduction as the companies whose risks it has reinsured, being relieved of taxes to the extent of the business transacted with plaintiff, could pay to plaintiff a higher premium than they could have paid had this deduction not been made. On the other hand, if it should be held that plaintiff is not liable for this tax, then no deduction should be made to the companies with which the plaintiff is doing a reinsurance business, with the result that these companies would not be able to pay to the plaintiff the rates which it is now receiving. In such a case, it would be necessary for the plaintiff either to refuse this business or to reduce its premiums if it expected to hold this reinsurance business. We, however, are of the opinion that, as the plaintiff was authorized to do reinsurance business in this state during the entire time at which the tax against it was levied, the state officials in levying the tax for those years correctly deducted from the gross premiums of the companies reinsuring with the plaintiff, the premiums paid to plaintiff, and that the plaintiff was liable for the tax computed upon its entire business transacted during those years, including its reinsurance of risks to property situated in this state.

The judgments are affirmed.

We concur: EDMONDS, J.; SHENK, J.; THOMPSON, J.; LANGDON, J.

8 Cal.2d 631

STASULAT et al. v. PACIFIC GAS & ELECTRIC CO.

S. F. 15758.

Supreme Court of California.

April 27, 1937.

Rehearing Denied May 27, 1937.

1. Appeal and error ⇐996

Where several inferences can reasonably be deduced from evidence, reviewing court must accept inference which supports verdict.

2. Electricity ⇐19(5)

In action against power company for death of employee of telephone company who was killed by fall from telephone pole caused by shock received from electrically charged telephone pole guy wire, evidence *held* sufficient to establish that guy wire had been charged by contact with sagging power line at time of accident.

3. Electricity ⇐16(4)

Failure of power company to maintain power line with clearance of telephone poles required by rules of Railroad Commission constituted negligence per se, as respects liability for death of telephone lineman.

4. Electricity ⇐16(5)

Power company *held* required to make reasonable and proper inspection of power line and to use due diligence to discover and repair dangerous sagging of which notice would be implied if it existed for such length of time that it should have been known.

5. Electricity ⇐19(5)

In action against power company for death of employee of telephone company who was killed by fall from telephone pole caused by shock received from telephone pole guy wire which was charged with electricity from sagging power line, evidence *held* to support finding that power company was negligent in maintaining power line in sagging condition.

6. Electricity ⇐16(3)

Negligence of power company in allowing power line to sag *held* not to render it liable for death of lineman caused by shock from power line touching hook, where power line could only have touched hook by being lifted there by experienced person, in absence of showing that such lifting of power line to hook was to be anticipated as natural and probable result of original negligence in allowing power line to sag.

7. Negligence ⇐59

Where consecutive acts of negligence have caused an injury, although to render person guilty of first negligent act liable it is not necessary that precise nature of second negligent act should reasonably have been anticipated, it is necessary that some such negligence ought to have been anticipated as a reasonably probable and ordinary consequence of situation created by original negligent act.

8. Negligence ⇐136(25)

Where consecutive acts of negligence have caused an injury, question of whether first negligent act was proximate cause of injury is ordinarily one of fact for jury.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Mary Stasulat and others against the Pacific Gas & Electric Company. Judgment for plaintiffs, and defendant appeals.

Reversed.

Prior opinion, 59 P.(2d) 1076.

Thomas J. Straub, W. R. Dunn, W. H. Spaulding, Clinton F. Stanley, and John J. Briare, all of San Francisco, for appellant.

Henry G. Sanford and George K. Ford, both of San Francisco, for respondents.

THOMPSON, Justice.

This case was taken over after decision by the District Court of Appeal, First District, Division One (59 P.(2d) 1076, 1077). The facts are taken from the opinion by Mr. Justice Gray sitting pro tempore.

"The surviving mother, brother, and two sisters of a lineman employed by the Pacific Telephone & Telegraph Company sued the Pacific Gas & Electric Company to recover damages for his alleged wrongful death. They claimed that his death resulted from injuries which he received in a fall from a telephone pole on which he was working, and that the fall was due to his receiving an electric shock, caused by appellant's negligence. As to such negligence, they charged that appellant negligently permitted its power lines to sag and so contact a guy wire fastened to the telephone pole, that the guy wire became electrically charged by means of such contact, and that decedent received an electric shock when he touched the guy wire. The jury found the facts as claimed by respondents, for it returned a verdict in their favor. From the judgment entered accordingly, appellant appeals, claiming the evidence is insufficient to establish (1) that its power lines contacted the guy wire; and (2) that, if they did, it was negligent in permitting them to do so.

[1] "'In considering appellant's claims of the insufficiency of the evidence it is our duty to so construe the evidence as to support the contentions of respondent to the extent that it is fairly susceptible of such construction, and in cases of conflict to accept as true that evidence which tends to sustain the verdict, unless it is inherently so improbable as to be palpably false.' Gett v. Pacific Gas & Electric Co., 192 Cal. 621, 623, 221 P. 376, 377. Accordingly, only such evidence as is favorable to respondents will be stated. If several inferences can reasonably be deduced from the evidence, this court must accept that one which supports the verdict. Gorman v. County of Sacramento, 92 Cal.App. 656, 268 P. 1083.

"Three and one-half years before the accident, the Pacific Telephone & Telegraph Company erected and thereafter maintained on the west side of Stevenson street 85 feet southerly of the southern line of McCoppin street, in the city of San Francisco, a terminal pole about 25 feet high above the ground. The pole was braced by a guy wire with one end anchored in the ground 15 feet southerly of the pole and with the other end wrapped twice around the pole 18 inches above the cross-arm. The guy wire was prevented from slipping down by a J hook (so called from its shape) forming part of it and placed on the inside or westerly side of the pole. A wooden cross-arm, on which were fastened coils of wires, used to connect new subscribers, was affixed to the pole. The distance from the center of the cross-arm to the top of the pole was 3 feet. About 4 inches below the center of the cross-arm, tied to the pole, there was a messenger wire which supported, by hangers, the communication cable. This cable passed down and into the rear of a terminal box, fastened to the north side of the pole, from which telephone lines were distributed to patrons in the vicinity. This box was 4¼ feet high, 1½ feet wide, and 1 foot deep, and had attached thereto a metal handle on each side near the top. Immediately below the box there was a wooden platform

2 feet wide and 1⅙ feet deep, with an open space of 9 inches between the inside edge of the platform and the front of the box. This was surrounded by a guard rail attached to the pole, 2 feet 5 inches above the platform and 1 foot 7 inches in width. For its ascension, iron steps were provided on the north and south sides of the pole, beginning about 8 feet above the ground. Before the erection of the telephone pole and continuously thereafter appellant had maintained 4 electrically charged lines, running diagonally in a northerly and southerly direction across Stevenson street. They were suspended from a cross-arm fastened to a pole, located at the southeast corner of Stevenson and McCoppin streets, and from a bracket, attached to a building on the west side of Stevenson street. When the telephone pole was installed, the power lines were 2 feet above the messenger wire and the nearest was over 2 feet east of the pole.

"The deceased had been instructed to install a telephone at an address on McCoppin street. In order to do so, it was necessary to connect a drop wire with the communication cable. A resident of the neighborhood saw him climb the pole, with his back toward the street, until his waist was even with the platform. Devoting her attention to household duties for a couple of minutes, she next observed him lying in the street at the foot of the pole. The death certificate stated that the cause of his death was a crushing of the dorsal vertebræ with crushing of the spinal cord due to a fall.

[2] "On the day after the accident, representatives of the telephone company and appellant visited the pole to investigate the cause of decedent's fall. At that time the supervisor of cable maintenance of the telephone company, upon inspection, found the four power wires of the appellant caught or jammed in the J hook with their insulation broken by the tension. Upon test, he learned that the guy wire was energized from the contact of power lines with the J hook and carried a current of 265 volts. In his opinion a person touching the guy wire and any ground on the pole would receive sufficient shock to cause him to lose his balance and thereby fall. Within an hour of the fall, decedent's immediate superior inspected the pole and saw the four power lines bunched into the J hook, but he did not then ascertain to whom they belonged. He was present at the investigation the next day and then learned they belonged to appellant. He stated that the power wires appeared to be in the same position on both occasions. This evidence was sufficient to establish that appellant's power wire contacted the guy wire at the time of the accident. Dow v. Sunset Tel. & Tel. Co., 157 Cal. 182, 106 P. 587.

"An engineer, employed by the telephone company, visited the scene of the accident on the fifth day after its occurrence. In the meantime, appellant had removed its power wires. By measuring, he found that the cross-arm on appellant's pole, to which its power wires had been attached, was 30.3 feet high above the ground level; that the bracket on the building, to which the power wires had also been suspended, was 25.58 feet high above the sidewalk; and that the distance between the cross-arm and bracket was 120 feet. He observed that appellant's pole deflected southerly for a distance which he estimated to be 16 or 17 inches. This deflection could have been due to any of several causes, but appeared to have taken place gradually. Assuming that, when the pole was perpendicular, the wires sagged 1 foot and that the wires were 'number 8 soft drawn, solid double braided weather wire,' he calculated, by means of a formula, that the deflection of the pole caused the wires to sag 7 feet downward at the telephone pole. The weight and elasticity of the wire, which were vital factors in the computation, were derived from his assumption of its type. Appellant introduced into evidence specimens of No. 8 and No. 4 wire. The latter is larger than the former. The only testimony as to size of wire used in the power lines was given by appellant's lineman who testified that it was No. 4. Obviously, since the calculation related to a different size of wire than that of which the power lines were composed, it had no evidentiary value in the case. The engineer by plotting on co-ordinated paper the curve of the power wires with such 7-foot sag found that the wire nearest the telephone pole was 1 foot away and the farthest was 2½ feet. This testimony is also valueless, because it deals with a 7-foot sag, which, as has been seen, concerns a type of wire not here involved.

[3-5] "When the telephone pole was erected, the power wires were 2 feet east of it. When the accident occurred, the power wires contacted the J hook on the

west side of the telephone pole. To establish the cause of the changed position of the power wires, respondents relied solely upon the engineer's testimony. In considering their argument on this matter, the engineer's testimony will be considered as applicable to the case. As plotted by him, the distance between the sagging wires and the telephone pole did not give the clearance required by the rules of the Railroad Commission, introduced in evidence by respondents. The failure of appellant to maintain their power lines with the clearance required was negligence per se. Howell v. San Joaquin L. & P. Corp., 87 Cal. App. 44, 261 P. 1107. Appellant was required to make reasonable and proper inspection of its power lines and to use due diligence to discover and repair their dangerous sagging. Notice of this sagging may be implied if it existed for such a length of time that it should have been known. Tackett v. Henderson Brothers Co., 12 Cal.App. 658, 108 P. 151; Roberts v. Pacific Gas & Electric Co., 102 Cal.App. 422, 283 P. 353. Since the engineer stated that the deflection of the pole appeared to have been gradual, it is reasonable to infer that the sagging was also gradual, and therefore had continued for a considerable time. The jury was justified in finding that appellant was negligent in maintaining the power lines in a sagging condition."

It is the position of the appellant that, conceding the fatal fall was caused by an electric shock received from the energized guy wire and that the appellant was negligent in permitting its wires to sag and remain in a position which did not give the clearance required by the rules of the Railroad Commission, such negligence was not the proximate cause of the accident, since, hanging in their normal position and as replaced after the accident, the appellant's wires were harmless for, although they did not meet the clearance requirements, they were two feet above the messenger and cable, did not come in contact with the telephone pole or any of its equipment, and were insulated. The appellant contends the chain of causation from its negligence was broken by an efficient intervening cause which did not flow as a natural consequence from the negligence of the appellant; that the change of position of the wires was in no way connected with any negligence in allowing the wires to sag but was the unforeseeable act of an independent agent. The physical factors are set forth in the opinion of the District Court (59 P.(2d) 1076, 1079).

"Originally, the power wires were 2 feet easterly of the terminal pole and 2 feet above the messenger wire. As the messenger wire was 4 inches below the center of the cross-arm, which was 3 feet below the top of the terminal pole, the power wires were then 1 foot 4 inches below the top of this pole. Since the engineer calculated that the power wires had sagged 6 feet more than their initial sagging of 1 foot, the additional sagging would place them 7 feet 4 inches below the top of the pole. The J hook was 18 inches above the cross-arm, or 1½ feet below the top of the pole on the opposite or west side. The witnesses all agreed that the power wires could not have been lifted to the top of the pole so that they could fall into contact with the J hook by the wind or other natural causes. They also agreed that such lifting could only have occurred through intervention of a human agency, and that no inexperienced person would have so changed the position of the wires, because of his appreciation of the danger of so doing."

[6-8] The rules for determining whether the independent force which acts upon the situation created by the original negligence is such an intervening cause that the original negligence is no longer a proximate cause of the injury are set forth in sections 442 to 453 of the Restatement of the Law of Torts and, as so reframed, lead to the conclusion that the appellant is not liable in the present case, even though it negligently allowed its wires to sag, if the realizable likelihood of the second negligent act is not one of the factors contributing to the negligent character of the first act; if a reasonable man, knowing the situation created by the first act, would regard it as highly extraordinary that the intervening act should have been done, or the act, although not an extraordinary response to the situation created by the original negligence, is done in an extraordinarily negligent manner. See section 447 of the Restatement and comment thereon. Our own cases support these propositions by the statement of the more general rule that, although it is not necessary to preserve the chain of causation from the original negligence that the precise nature of the second negligent act should reasonably have been anticipated, it is necessary that some such negligence should have been

anticipated as reasonably likely to follow as a natural and ordinary consequence of the situation created by the original negligent act. Sawyer v. Southern Cal. Gas Co., 206 Cal. 366, 274 P. 544; Schwartz v. Calif. Gas & Electric Co., 163 Cal. 398, 125 P. 1044; Hale v. Tel. & Tel. Co., 42 Cal. App. 55, 183 P. 280; Polloni v. Ryland, 28 Cal.App. 51, 151 P. 296. Although, as a general rule, the question whether the original negligence is a proximate cause of the injury is one of fact for the jury (Lacy v. P. G. & E. Co., 220 Cal. 97, 101, 29 P.(2d) 781), it must be said here that, as a matter of law, the issue of proximate cause was not proved (Restatement of the Law of Torts, § 453). There was no evidence upon which the jury could reasonably conclude that the lifting of the wires a foot and a half over the top of the pole and the crowding of the four wires into the J hook with such force as to break their insulation was an act which should reasonably have been foreseen and anticipated as a result of the sagged condition of the wires, or even that there was more than a remote and slight probability of the occurrence of any positive act which would bring the wires in contact with the telephone pole or its equipment, much less destroy the insulation. This is especially so in the light of the fact that none but experienced linemen, who know that such an act would but increase the danger inherent in the sagged condition, could reasonably be expected to climb the pole and interfere in any way with the wires of the defendant company. There is no contention that there was any such interference by any employee of the defendant.

The judgment is reversed.

We concur: EDMONDS, J.; SHENK, J.; SEAWELL, J.; CURTIS, J.



8 Cal.2d 648

NELSON v. SOUTHERN PAC. CO.

S. F. 15731.

Supreme Court of California.

April 27, 1937.

1. Railroads ⇐350(17, 19)

Presence of train on track, and failure of motorist to look again to right after entering on crossing, *held* for jury, as respects whether motorist colliding with train approaching from her right was contributorily negligent.

2. Trial ⇐165

Trial court passing on motion for nonsuit must resolve all conflicts in evidence in favor of plaintiff.

3. Railroads ⇐350(19)

Motorist's choice of position for observation of trains at crossing *held* for jury, as respects whether motorist colliding with passenger train at crossing was contributorily negligent.

4. Railroads ⇐350(11)

Whether speed of train on its right of way near crossing is negligence is question for jury, notwithstanding that railroad may have right to determine speed of its trains.

5. Appeal and error ⇐1064(1)
Railroads ⇐351(10)

Instruction that operation of train with which motorist collided at crossing, at any rate of speed railroad might see fit, was not negligence and that jury could consider speed at which train was traveling before reaching crossing only for purpose of determining speed at which train was being operated at crossing was erroneous, but not prejudicial, where engineer testified that speed of train was in excess of that required at crossings by ordinance.

6. Trial ⇐253(4)

Instruction and special interrogatory on contributory negligence of motorist suing for injuries sustained in crossing collision with train *held* erroneous for omission of element of proximate cause.

7. Negligence ⇐82

Contributory negligence of plaintiff must be contributing proximate cause of injury to bar recovery.

8. Railroads ⇐351(9)

Trial court could properly give instruction on duty of railroad sued for injuries sustained by motorist in crossing collision, to give warning as train approached crossing.

9. Trial ⇐261

Court can refuse to give offered instructions which cannot properly be given without modification.

10. Railroads ⇐351(10)

Refusal to instruct that railroad sued for injuries sustained by motorist in crossing col-

lision had duty to operate train at reasonable speed at crossing in view of conditions then existing *held* not error, where railroad admitted that train was traveling in excess of speed permitted at crossing by ordinance.

11. Railroads ⇐351(16)

Instruction that nature, proximity, and loudness of locomotive bell should be considered in determining contributory negligence of motorist suing for injuries sustained in crossing collision, and that motorist's failure to look again in direction from which train approached was not negligence if motorist exercised reasonable care in ascertaining whether there was sufficient stretch of straight tracks clear of trains to lead reasonably prudent person to feel that train operated at reasonable and lawful speed would not interfere with safe passage of crossing, should have been given where such matters were not touched on except in sudden peril instruction.

12. Railroads ⇐347(1)

In motorist's action against railroad for injuries sustained in crossing collision, exclusion of railroad's time-table *held* not error, where time-table was only remotely connected with collision.

13. Railroads ⇐347(1)

In action against railroad for injuries sustained in collision with train, railroad's rules of operation are admissible.

14. Witnesses ⇐393(3)

In motorist's action against railroad for injuries sustained in crossing collision, questioning of engineer as to whether he had refused to testify at coroner's inquest on death of passenger in motorist's automobile on ground of his privilege against self-incrimination *held* proper for impeachment purposes, since claim of privilege gave rise to inference bearing on credibility of his statement of lack of negligence on his part.

15. Appeal and error ⇐1069(1)

Under statute, court's communication with jury after retirement by sending them message by bailiff and without presence of counsel *held* prejudicial (Code Civ.Proc. § 614).

In Bank.

Appeal from Superior Court, Santa Clara County; R. R. Syer, Judge.

Action by Gertrude C. Nelson against the Southern Pacific Company and others. From a judgment for the defendants, plaintiff appeals.

Reversed.

Prior opinion, 58 P.(2d) 958.

N. E. Wretman, Alfred Aram, and Aram & Wretman, all of San Jose, and George Olshausen and John K. Hagopian, both of San Francisco, for appellant.

Louis Oneal and A. G. Shoup, both of San Jose, for respondents.

THOMPSON, Justice.

This is an appeal by the plaintiff from a judgment for the defendants in an action for damages for injuries sustained in a collision with a Southern Pacific Company passenger train at a crossing on Stockton street in the city of San Jose. It is argued that the court committed error in the giving and refusing of instructions on negligence and contributory negligence, in the submission to the jury of a special interrogatory on the subject of contributory negligence which omitted the element of proximate cause, in rulings on evidence and in communicating with the jury through the bailiff without the presence of counsel.

[1] The accident occurred on a bright sunny afternoon, the street upon which the plaintiff approached the crossing ran at an oblique angle to the right of way on which there were five sets of tracks running approximately east and west. According to the plaintiff's testimony, she stopped with the front of the car about 8 feet from the first track and looked both ways. She saw nothing to the right, in which direction she had a clear view for about a quarter of a mile. She did not look in that direction again. To the left she observed a freight train on the crossing on track 1 for which she waited. She started across the tracks in second gear at a speed between 4 and 6 miles an hour. She also saw a locomotive to her left on track 2. As she reached the second set of tracks, she heard a series of whistles and also heard puffing and letting off of steam. She thought the engine on the second track was coming toward her and that it was whistling to warn her. She continued across the crossing and was struck by the passenger train approaching from her right on track 4. It is conceded that the train was traveling in excess of the speed the law allows at crossings. The testimony as to the giving of the statutory warnings by bell and whistle is in direct conflict. But the plaintiff testified

she heard neither, that she was intent upon the train and engine to her left and upon the roadway, which was rough. She traveled about 30 feet after passing track 2 before reaching the point of collision with the train on track 4. By a series of close calculations, it is argued that the train was visible if ordinary care had been used in making the initial observation and the plaintiff's positive statement that she did not see it must be disregarded. The sum of these calculations, based in part on an estimate of the speed of the train given by the engineer, brings the train within the range of the plaintiff's vision by a margin of less than two seconds. It is obvious that even a slight error in the estimation of speed and distances would produce a totally different result. Such estimates and calculations do not therefore appear to us to be a sound basis upon which to declare inherently improbable the plaintiff's positive statement that no train was visible for a quarter of a mile on a stretch of straight track. The presence of the train, on which there is much testimony in conflict with the plaintiff's, is a question for the jury, as is also her conduct in failing to look again to her right, in the presence of what she considered to be a definite hazard on her left and in traversing a difficult crossing. Walker v. Southern P. Co., 38 Cal. App. 377, 176 P. 175; Pietrofitta v. Southern P. Co., 107 Cal.App. 575, 290 P. 597.

[2, 3] Although, when all conflicts are resolved in favor of the plaintiff, as the trial court was required to do in passing upon the motion for nonsuit [In re Estate of Flood, 217 Cal. 763, 21 P.(2d) 579], it appears that the case was properly left to the jury, it does not follow that the finding of the jury in favor of the defendants is not sustained by the evidence. Nor does the appellant so contend. Numerous witnesses testified to the presence of the train within the plaintiff's range of vision from the spot where she stopped to take her observation. There is testimony to the effect that the bell was rung in compliance with the statutory requirement on approaching the intersection; that the whistle was also blown when it appeared that the plaintiff was in a position of danger; that there was no engine present on track 2 to distract her; that, in any case, she had at least 30 feet to travel after passing track 2 to the point where she was struck; and that the crossing was not particularly rough. A picture of the crossing introduced in evidence shows an open grade crossing and a long stretch of straight track with an unobstructed view for about 6,000 feet in the direction from which the passenger train approached. It was taken about 14 or 15 feet back from the first line of track. It does appear that there is a line of telegraph poles which might obstruct the view from some positions. But the plaintiff's choice of a position for observation is also a question for the jury. Pietrofitta v. Southern P. Co., supra.

[4, 5] The appellant complains of errors in the course of the trial and while the jury was deliberating. It is first urged that the trial court erred in instructing the jury that "it was not negligence on the part of the defendant to operate the locomotive and train on the private right of way of the Southern Pacific Company west of the Stockton street crossing at any rate of speed they might see fit" and that they could consider the speed at which the train was traveling before reaching the crossing only for the purpose of determining the speed at which it was being operated at or across the crossing. The appellant's argument is that this was erroneous because there was obviously a duty to operate the train at a speed which would enable it to approach the crossing at the required speed, and because the speed of the train was clearly relevant to the question of visibility, hence the effect of the instruction was to remove the question of speed from the consideration of the jury. The instruction complained of is certainly not a correct statement of the law. It may be conceded that the defendant had the right, without violating any law, to determine the speed of its trains on a private right of way, but whether that speed, in view of the surrounding circumstances, was negligence was a question for the jury. Dow v. Southern Pacific Co., 105 Cal.App. 378, 288 P. 89. However, the error can hardly be said to be prejudicial for the reasons assigned, inasmuch as the defendant's engineer testified he was traveling at a speed in excess of that required at crossings by ordinance and there was direct and conflicting evidence on the position of the train at the time the plaintiff was making her observation given by witnesses who saw both her car and the train. It was also urged that this was an instruction on the facts, but the disposition made of this claim of error renders it unnecessary to discuss the right of a trial judge to comment on the

facts in a civil action under the recent constitutional amendment. Article 6, section 19, California Constitution.

[6, 7] The appellant next urges that the trial court erred in giving an instruction on contributory negligence which in its concluding sentence (which was in effect a formula instruction) omitted the element of proximate cause. Admittedly several correct instructions were given on the same subject and it is conceded that this would cure the error except for the fact that the judge submitted to the jury a special interrogatory which was erroneous in the same respect and emphasized the error in the instruction. Both instruction and special interrogatory were incorrect statements of the law which requires the contributory negligence of the plaintiff to be a contributing proximate cause of the injury. Rush v. Lagomarsino, 196 Cal. 308, 237 P. 1066.

[8, 9] It is next complained that the court did not instruct the jury at all upon the duty of the defendant company to give warning as the train approached the crossing. It is conceded that the instruction offered by the plaintiff was incorrect, but it is insisted that this did not relieve the court of the duty to give a proper instruction upon a relevant issue thus called to its attention. Undoubtedly it would have been proper for the court to instruct the jury on the duty of the defendant to give warning as it approached the intersection (Bruce v. Western Pipe & Steel Co., 177 Cal. 25, 169 P. 660; People v. Frey, 165 Cal. 140, 131 P. 127), but it has been frequently held that where instructions are offered which cannot properly be given without modification the court may refuse to give them (Wiley v. Young, 178 Cal. 681, 174 P. 316; Dover v. Archambeault, 57 Cal.App. 659, 664, 208 P. 178, and cases cited).

[10] Also on the question of defendant's negligence, it is objected that the court refused a requested instruction to the effect that, without reference to statutory regulation of speed at crossings, it was the duty of the defendant to operate its train at a reasonable speed with relation to the particular crossing and the conditions there existing and that a failure to do so was negligence. In view of the regulation of speed by ordinance at the crossing involved in this action and the admission that the train was traveling at a rate in excess thereof, the giving of this instruction was unnecessary.

[11] On the subject of contributory negligence, the appellant insists the court erroneously refused to instruct the jury to consider the nature, proximity, and loudness of the warning bell or whistle in determining Miss Nelson's negligence and also refused to instruct that if there had been reasonable care in ascertaining whether there was a sufficient stretch of straight track clear of trains to lead a reasonably prudent person to feel that a train operated at a reasonable and lawful speed would not cover that distance and interfere with his making the crossing it was not necessarily negligent to fail to look in that direction again, especially where the attention was required or diverted by other circumstances. The respondent does not contend that these are improper statements of the law, but that some of their elements are not supported by the evidence and that they are in other respects covered by instructions given. Since the only instruction which is pointed out as bearing on these points is one on sudden peril, which introduces a slightly different element, we think the instructions should have been given.

[12-14] It cannot be said that the exclusion of the respondent's time-table was erroneous. While the rules of operation are admissible [Gett v. Pacific Gas & Elec. Co., 192 Cal. 621, 221 P. 376; Smellie v. Southern Pacific Co., 128 Cal.App. 567, 583, 18 P.(2d) 97, 19 P.(2d) 982], we fail to see the materiality of the time-table to the situation under scrutiny. It was, to say the most, only remotely connected therewith. However, the court erroneously sustained an objection to the question put by the plaintiff's counsel to the engineer of the train as to whether he had not refused to testify at the coroner's inquest (on the death of one of the passengers in the Nelson car) on the ground of his privilege against self-incrimination. Such a question was proper for impeachment purposes since the claim of privilege gives rise to an inference bearing upon the credibility of his statement of lack of negligence upon his part. People v. Casanova, 54 Cal.App. 439, 202 P. 45; Fross v. Wotton, 3 Cal. (2d) 384, 44 P.(2d) 350.

[15] The remaining error charged was that the court communicated with the jury after their retirement by sending them a message by the bailiff and without the

presence of counsel. This is an improper irregularity. Section 614 of the Code of Civil Procedure requires that, if the jury desire further instruction, it shall be conducted into court and the information desired given in the presence of or after notice to counsel. Any other method of communication is held to go to the substance of the right of trial by jury and because of its nature is deemed to be prejudicial except in very exceptional circumstances. Redman & Yontz v. Gulnac, 5 Cal. 148; Soukoian v. Cadillac Taxi Co., 68 Cal.App. 604, 229 P. 1015; People v. Bruneman, 4 Cal.App.(2d) 75, 40 P.(2d) 891.

While the case is not a close one, the pictures presented by the testimony in favor of the plaintiff and by that in favor of the defendant being widely divergent, we are not prepared to say that the sum of these errors was not prejudicial to the plaintiff's case and that the jury must have found as they did under a proper presentation of the case to them.

The judgment is reversed.

We concur: LANGDON, J.; CURTIS, J.; EDMONDS, J.; SEAWELL, J.; SHENK, J.

KEY NUMBER SYSTEM

DRYDEN v. CONTINENTAL BAKING CO. et al. *

Civ. 5590.

District Court of Appeal, Third District, California.

April 26, 1937.

Hearing Granted by Supreme Court June 24, 1937.

1. Food ⇐25

Evidence in action against baking company for injuries from eating bread containing broken particles of glass *held* sufficient to support court's finding that plaintiff actually ate bread containing glass, though glass was not found in every slice of bread purchased.

2. Food ⇐25

Evidence in action against baking company for injuries from eating bread containing broken particles of glass *held* sufficient to support trial court's finding that plaintiff suffered bodily injury from swallowing glass.

3. Torts ⇐27

Whether injury caused by tort was direct, as by blow, or indirect through some action on injured person's mind is immaterial on question of right to recover damages.

4. Damages ⇐52

While negligent act causing mere fright, unaccompanied by contemporaneous physical injury, is not actionable, where neither willful nor malicious, fright accompanying or following wrongful physical injury is element of damage.

5. Damages ⇐49

Mental suffering, naturally ensuing from negligent act, is element of damage in aggravation thereof, though insufficient alone to support action for damages.

6. Sales ⇐274

Purchase of bread from grocer for consumption by purchaser and his family constituted "sale" within act declaring existence of implied warranty that goods purchased in reliance on skill or judgment of seller, whether grower or manufacturer, by one expressly or impliedly making known to seller particular purpose for which goods are required, are reasonably fit for such purpose, so as to render baker thereof liable for injuries to purchaser's wife from swallowing broken particles of glass therein (Civ.Code, § 1735).

[Ed. Note.—For other definitions of "Sale," see Words & Phrases.]

7. Sales ⇐273(2)

Manufacturer, selling article made by him, impliedly warrants its freedom from latent defects arising from manufacturing process or use of defective materials.

8. Food ⇐25

Baker of bread containing broken particles of glass *held* guilty of negligence and hence liable for injuries to wife of one purchasing bread from grocer as result of swallowing glass.

9. Food ⇐25

Wife of one purchasing bread containing broken particles of glass from grocer *held* not, as matter of law, guilty of contributory negligence, barring recovery of damages from baker for injuries caused by swallowing glass, in failing to examine bread to discover possible presence of foreign or deleterious substances therein before eating it.

*For subsequent opinion see 77 P.2d 833.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by Evelyn E. Dryden against the Continental Baking Company and the Continental Baking Company, doing business under the firm name and style of the Wonder Bread Company. Judgment for plaintiff, and defendants appeal.

Affirmed.

Barry J. Colding, Theodore Hale, and Carroll B. Crawford, all of San Francisco, for appellants.

Clifford A. Russell and A. M. Mull, both of Sacramento, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

The judgment rendered in favor of plaintiff in this action for damages for personal injuries suffered by her from eating bread baked by defendant, which contained numerous small broken particles of glass, is affirmed.

In December, 1933, the husband of plaintiff purchased from their neighborhood grocer a loaf of wrapped, sliced rye bread, for the consumption of himself and his family including his wife, plaintiff herein, his son, and the mother of plaintiff. The bread was served at the evening meal, but finding what was considered grit in the bread, it was put aside. In the morning it was served as toast, but it was again discovered to contain some gritty substance, and upon examination small particles of glass were found in some of the slices. Upon being submitted to a chemist, numerous pieces of glass were found in the bread, the toast, and in a portion of masticated bread.

It is the contention of plaintiff that she ate some of the bread, and as a result thereof suffered "nervous shock, mental suffering and agony, inflammation of the stomach and intestines and sharp cutting pains in the region of the stomach and intestines."

From a judgment in her favor, the baking company has appealed, claiming that the evidence is insufficient to support the material findings.

[1] It is first contended inasmuch as glass was not found in every slice of the bread, there is no evidence to support the finding that plaintiff actually ate any of the bread which contained glass. Plaintiff testified she ate at least one slice of bread at the evening meal, and the next morning at breakfast she ate two or three slices of the toasted bread. She noticed the presence of some gritty foreign substance in the bread which she masticated and swallowed, but did not know what it was until her husband, after attempting to eat a slice of the toasted bread, detected foreign substance and spat it out and discovered the grittiness was caused by particles of glass. From these facts, it can be reasonably concluded plaintiff actually swallowed particles of the glass.

[2] The finding that plaintiff suffered bodily injury from swallowing the glass, is next attacked as not supported by the evidence. However, plaintiff testified that in a day or two after partaking of the bread she suffered "pains of indigestion." Prior to that time she had not been so afflicted, but thereafter for several months she suffered pains and disturbances. She was employed as an office nurse or assistant and was compelled, because of such pains, to remain home from work many days. At times she was unable to eat and was greatly worried, and testified that the effect of having swallowed particles of glass finally resulted in chronic indigestion lasting from December to June or July. Dr. Jones, a physician and surgeon, was called on the day plaintiff ate the bread and found her exceedingly nervous, and thereafter during the times that Dr. Jones was acting as her physican, which extended at least up to the time of the trial, he testified she complained of indigestion, and her mental and nervous condition became gradually worse. She was unable to eat and lost weight, her resistance was lowered, and on several occasions she became quite sick, and in time developed a definite neurasthenic condition.

The husband of plaintiff testified she complained of acute pains in her stomach a few days after partaking of the bread which continued intermittently for several months, and that she was unable to continue regularly with her office work. This condition continued to exist until, due to other causes, an abdominal operation was necessary and was performed by Dr. Jones who, after an examination of the wall and lining of the stomach and intestines, assured plaintiff that there was no evidence of irritation of those parts caused by the particles of glass. From that time on her health began to improve.

Dr. Turner, a physician having offices adjoining the dental office in which plaintiff was employed, testified that she was frequently required to lie down during office

hours and often complained of being unable to eat and of suffering pain in the region of the stomach.

Upon this testimony the trial court found that plaintiff partook of the bread and that the glass therein was taken into her stomach and intestines and caused plaintiff to become violently ill and to suffer intense pain, necessitating immediate treatment, and inflicted upon plaintiff nervous shock, mental suffering and agony, inflammation of stomach and intestines, sharp cutting pains in the region of the stomach and intestines. Such finding is amply supported.

[3] In addition to the actual physical pain and suffering testified to by plaintiff, she also suffered from fright and nervous shock, and the rule is well settled that where the cause of the injury is tortious, it is immaterial whether such injury is direct as by a blow, or indirect through some action upon the mind. In Lindley v. Knowlton, 179 Cal. 298, 176 P. 440, plaintiff sued for damages for personal injuries because of fright occasioned by the appearance in plaintiff's house of a chimpanzee. The complaint alleged that the chimpanzee attacked the children of plaintiff, and as a consequence thereof plaintiff "was greatly frightened, shocked, and made sick in body and mind; * * * her nervous system was disordered; she was rendered hysterical and caused to suffer pain and mental anguish." No claim was made that plaintiff suffered bodily injury by contact with the chimpanzee.

Defendant, as appellant, contended the trial court erred in refusing to give an instruction that no recovery could be had unless the fright of plaintiff was accomplished by some personal and bodily injury, and that the injury must be physiological. The jury were instructed, however, that plaintiff could not recover unless she received injuries which were the natural consequences of fright, caused as alleged in the complaint; that such occurrence as recited in the complaint had taken place and was the proximate cause of the injuries. The court quoted with approval from Sloane v. Southern Cal. Ry. Co., 111 Cal. 668, 44 P. 320, 322, 32 L.R.A. 193, to the effect: "Whatever may be the influence by which the nervous system is affected, its action under that influence is entirely distinct from the mental process which is set in motion by the brain. The nerves and nerve centers of the body are a part of the physical system, and are not only susceptible of lesion from external causes, but are also liable to be weakened and destroyed from causes primarily acting upon the mind. If these nerves, or the entire nervous system, is thus affected, there is a physical injury thereby produced; and, if the primal cause of this injury is tortious, it is immaterial whether it is direct, as by a blow, or indirect, through some action upon the mind." The principle thus expressed is also approved in Huntly v. Zurich, etc., Co., 100 Cal.App. 201, 280 P. 163.

In Kenney v. Wong Len, 81 N.H. 427, 128 A. 343, 347, plaintiff, a patron of defendant's restaurant, ate some dressing from a roasted chicken in which she discovered a dead mouse. This discovery made her sick, and a nervous shock resulted. It was there contended, as here, that no recovery could be had for the result of fright caused by negligence where there was no immediate physical injury.

The court there held: "Immediate physical injury as the result of negligence being shown, whether or not induced by some form of fright, there may be recovery for subsequent mental or nervous trouble with its attendant bodily effects, whether or not produced by fright in a narrow sense, or in a broad one to include emotions of disgust and shame, if negligence is proved as its case."

[4, 5] In Easton v. United Trade School Con. Co., 173 Cal. 199, 159 P. 597, L.R.A. 1917A, 394, plaintiff was driving a horse attached to a buggy when an agent of defendant drove an automobile against the buggy. Damages were awarded plaintiff, and one of the contentions of appellant upon appeal was that plaintiff had received no injuries as such; that she suffered only from fright; and that fright alone, without personal injury, cannot be made the foundation for an action for damages. Answering that contention, the court, through Mr. Justice Henshaw, found that she sustained a direct personal shock by the blow of the automobile, and that the fright was but a natural and direct consequence of defendant's trespass. Undoubtedly, as is there said, an act of negligence neither willful nor malicious causing mere fright unaccompanied by contemporaneous physical injury is not actionable, but when fright accompanies or follows a wrongful physical injury it is an element of damage. Under such circumstances, fright is but one form of mental anguish, and mental

anguish as a direct reasonable outcome of the illegal physical injuries is always an element of damage. Although mental suffering alone will not support an action for damages, yet mental suffering is an element of damage in aggravation thereof, when it naturally ensues from the act complained of. Thomas v. Gates, 126 Cal. 1, 7, 58 P. 315.

In the case of Johnson v. Sampson, 167 Minn. 203, 208 N.W. 814, 816, 46 A.L.R. 772, the court had under consideration an action in which false charges of unchastity had been made, resulting in alleged mental and bodily injuries. In discussing the case the court said:

"On the whole we see no good reason why a wrongful invasion of a legal right, causing an injury to the body or mind which reputable physicians recognize and can trace with reasonable certainty to the act as its true cause, should not give rise to a right of action against the wrongdoer, although there was no visible hurt at the time of the act complained of."

In Morton v. Western Union Tel. Co., 130 N.C. 299, 41 S.E. 484, 485, the court was considering what was meant by "other injury to the person," and held that any mental injury was an injury to the person.

In the case of Goetten v. Owl Drug Co., 6 Cal.(2d) 683, 59 P.(2d) 142, the point was there made as here, that there was no evidence that the plaintiff swallowed any of the glass or that she suffered any physical injury therefrom. From the statement of facts given by appellant, it appears plaintiff "found in her mouth a small piece of glass while eating chow mein at a lunch counter of defendant." There was no evidence that she swallowed any glass. She became greatly alarmed, so much so that in time she became a nervous wreck. The evidence further shows without question that the only physical injury suffered was a slight cut in her mouth which healed almost at once, and on account of which she suffered no injury or damage except as above stated. X-rays were taken but no signs of glass were discovered, although the particular type of glass taken from the mouth by plaintiff would show up under such an examination if present. We have examined the record in this case, and it does not appear that plaintiff suffered any injury to the gastro-intestinal tract, but the testimony of her doctor, however, was that she became extremely emotional and that there was danger of development of a decided mental condition.

In Johnson v. Pearson, 100 Cal.App. 503, 280 P. 394, 396, the court said: "Furthermore, nervousness, when a reasonable outcome of physical injuries, is always an element of damage, and obviously evidence relating thereto may properly be submitted to the jury," and cited several cases in support thereof.

While it may be true that examinations of plaintiff fail to reveal any mechanical injuries to the digestive tract by reason of the particles of glass, she testified to severe physical pains, and there is no doubt that plaintiff suffered a very distinct physical shock brought about directly by the taking of the glass into her mouth.

[6] The next contention of appellant is that the trial court erred in finding that the defendant breached the terms of an implied warranty to plaintiff as to the character or quality of the bread sold. The Uniform Sales Act, section 1735 of the Civil Code provides as follows:

"(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose."

There can be no doubt the purchase of the bread from the defendant constituted a sale within the meaning of the foregoing act, especially when plaintiff either specifically or by implication made known to the seller the particular purpose for which it was required

In Gindraux v. Maurice Mercantile Co., 4 Cal.(2d) 206, 47 P.(2d) 708, plaintiff had purchased some salami in a sealed package from the producer, who, in the ordinary course of trade, sliced off the end of the original package of salami and sold it to plaintiffs for home consumption. Plaintiffs brought the action for damages suffered as the result of eating the salami, which proof showed was infected with trichinae. The court there said:

"The defendant therefore knew by implication the particular purpose for which the salami was required. From that fact there arose an implied warranty that the commodity was reasonably fit for such purpose."

This rule is expressly approved in Mix v. Ingersoll Candy Co., 6 Cal.(2d) 674, 59 P.(2d) 144; Temple v. Keeler, 238 N.Y. 344, 144 N.E. 635, 35 A.L.R. 920; Ryan v. Progressive Grocery Stores, 255 N.Y. 388, 175 N.E. 105, 74 A.L.R. 339; Farrell v. Manhattan Market Co., 198 Mass. 271, 84 N.E. 481, 15 L.R.A.(N.S.) 884, 126 Am. St.Rep. 436, 15 Ann.Cas. 1076.

[7] Many other cases supporting the rule that a manufacturer who sells an article of his own making impliedly warrants that it is free from latent defects arising from the process of manufacture or the use of defective materials, is gathered in a note in vol. 3, Am.St.Rep., p. 705 et seq. Also in 24 Ruling Case Law, p. 195 et seq. will be found citations to many selected cases supporting the foregoing rule.

[8] That the court was correct in finding defendant guilty of negligence is established by such cases as Linker v. Quaker Oats Co. (D.C.) 11 F.Supp. 794, and the many cases there collected and referred to.

[9] The contention that plaintiff was guilty of contributory negligence is settled contrary to the claim of appellant in Ternay v. Ward Baking Co. (Sup.) 167 N.Y. S. 562, which holds it is a question for the jury whether an ordinarily prudent person is required to examine a piece of bread to discover the possible presence of foreign or deleterious substances before eating it.

For the foregoing reasons, and as hereinbefore indicated, the judgment should be affirmed and it is so ordered.

We concur: HELD, Justice pro tem; PLUMMER, J.



20 Cal.App.2d 589

In re OLSON.

Civ. 10514.

District Court of Appeal, First District, Division 2, California.

April 29, 1937.

Hearing Denied by Supreme Court June 28, 1937.

1. Appeal and error ⇐1031(1), 1032(1)

Error, if any, in setting off to homestead claimant part of land in which execution was sought, in excess of claimant's $1000 exemption, *held* not reversible, in absence of showing in record that amount of claims of person seeking execution exceeded the value of remainder of property left subject to execution, since prejudice could not be presumed, and no showing of prejudice was made by record (Code Civ.Proc. § 475; Civ.Code, § 1260; Const. art. 6, § 4½).

2. Appeal and error ⇐1032(1)

Error, if any, in procedure on application to secure execution against homestead *held* not reversible, in absence of showing of prejudice, in that remainder of property left subject to execution after allowance of homestead exemption was of insufficient value to satisfy claims of persons seeking execution (Civ.Code, § 1260; Code Civ.Proc. § 475; Const. art. 6, § 4½).

Appeal from Superior Court, Riverside County; George R. Freeman, Judge.

Proceeding in the matter of the application of Henry Olson, sometimes known as Henry Olsen, to secure execution against the homestead claimed by Bessie D. Wright. From an order confirming the report of the appraiser, the applicant appeals.

Affirmed.

Harold King, of San Bernardino, for petitioner.

P. E. Bingman, of San Bernardino, for respondent.

SPENCE, Justice.

This is an appeal by the petitioner from an order confirming the report of the appraisers in the above-entitled proceeding.

Petitioner obtained two judgments against Bessie D. Wright in the justice's court in San Bernardino county. Petitioner then brought this proceeding in the superior court of Riverside county to secure execution against a homestead. Civ. Code, § 1245 et seq. One of said judgments was alleged to be in the sum of $100, but the amount of the other judgment does not appear from the record herein. It appears that the total value of the homestead was $3,050 and that the value of the portion set off to the homestead claimant was $2,550, leaving the remainder of the property of the value of $500 subject to execution in satisfaction of said judgments. The claimant was an unmarried woman who

was not the head of a family and she was entitled to a homestead exemption of $1,000. Civ.Code, § 1260.

[1] The main contention of appellant is that the trial court erred in setting off to the homestead claimant a portion of the land having a value in excess of the claimant's $1,000 exemption. Civ.Code, § 1253. Assuming, without deciding, that the trial court did so err, appellant has wholly failed to show that such error was prejudicial. The remainder of the property left subject to execution was of the value of $500 and, if this property was ample to satisfy appellant's claims, he was not prejudiced. The record does not disclose the amount of appellant's claims except as above set forth. Prejudice may not be presumed and, upon the record before us, we are of the opinion that no showing of prejudice has been made. Under these circumstances a reversal is not warranted. Const. art. 6, § 4½; Code Civ.Proc. § 475.

[2] Appellant also complains of alleged error in procedure. While the procedure adopted by the trial court appears to have been substantially the procedure indicated in Brown v. Starr, 75 Cal. 163, 16 P. 760, we may likewise pass this claim of error without further comment as no prejudice has been shown.

The order is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



PARRY v. BERKELEY HALL SCHOOL FOUNDATION et al. *

Civ. S. C. 32.

District Court of Appeal, Second District, Division 1, California.

April 23, 1937.

Hearing Granted by Supreme Court June 21, 1937.

1. Trusts ⇐203

Where trustor reserved right of reversion on sale of intoxicating liquors on premises, and trustee, on conveying premises, attempted to reserve right of reversion to trustee on same condition, trust beneficiary could not claim fee on breach of condition through trustee's alleged right of reversion, since trustee could not reserve right of reversion in fee, because such interest was retained by trustor (Civ.Code, §§ 669–703).

2. Appeal and error ⇐843(2)

Where trustor reserved right of reversion on sale of intoxicating liquors on premises, trustee, on conveying premises, attempted to reserve right of reversion to trustee on same condition, and trustor sought no affirmative relief in trespass to try title action by trustee's grantee in which trustor was named defendant, on appeal from judgment declaring trust beneficiary owner in fee of premises on theory that beneficiary could claim through trustee's alleged right of reversion, court would not consider whether trustor had waived right of reversion (Civ.Code, §§ 669–703).

Appeal from Superior Court, Los Angeles County; Minor Moore, Judge.

Action by Agnes S. Perry against the Bank of America and others, wherein defendant Berkeley Hall School Foundation filed a cross-complaint against plaintiff and Charles Eaton, doing business under the fictitious firm name and style of Eaton's Steak & Chop House. From an adverse judgment, and from adverse orders, cross-defendants appeal.

Appeals from orders dismissed; judgment reversed.

William Schreider, of Los Angeles, for appellant Agnes S. Parry.

Conroy & Conroy, of Hollywood, for appellant Charles Eaton.

William M. Byrne, of Los Angeles, amicus curiæ in support of appellant.

Girard F. Baker and Macfarlane, Schaefer, Haun & Mulford, all of Los Angeles, for respondent Berkeley Hall School Foundation.

SHINN, Justice pro tem.

Rodeo Land & Water Company, owner of 77 acres of land known as lot 7 of tract No. 3613, conveyed the same to Bank of America as trustee under a subdivision trust. Lot 7 was then subdivided into lots for residential and business uses and became tract No. 7005. Under a trust indenture issued by the bank, Rodeo Company was trustor and Berkeley Hall School Foundation was beneficiary, Rodeo Company being entitled to receive a certain price for the land from sales of lots which the trustee was authorized to make at stip-

*For subsequent opinion see 74 P.2d 738.

ulated prices, and the Foundation being entitled to receive the remainder of the proceeds from sales and any unsold lots. Plaintiff purchased from the bank and received separate deeds of the bank to lots 347, 348, and 349 of tract 7005.

The deed of Rodeo Company to the bank, as trustee, contained a restrictive condition against the sale of intoxicating liquors upon the land conveyed and a provision for reversion of title to the grantor upon breach of the condition. The several deeds of the bank to plaintiff Parry contained an identical restrictive condition and provision for reversion of title to the grantor bank upon breach of this condition. Plaintiff constructed a building on lot 347 and leased the same to defendant Eaton, who operated thereon a cafe, wherein he engaged in the sale of intoxicating liquors. Lots 348 and 349 were not so used. Plaintiff was notified in writing by the bank that such sales of liquor were in violation of the condition of the conveyances from the bank to plaintiff, and that the situation must be remedied immediately. The Foundation notified plaintiff and Eaton that it would exercise its right to immediate entry upon the land and would claim a reversion of the title unless there was a permanent cessation of the vending of intoxicating liquors thereon. No question is involved as to the sufficiency of the notice and demands, which conformed in all respects to the requirements of the deed. The selling of liquor was continued in disregard of the demand, and plaintiff brought this action to quiet her title to the three lots against the claims of the Rodeo Company and the Foundation, based upon either the reservation in the deed of Rodeo Company to the bank or that in the deeds of the bank to plaintiff, and for a decree annulling the restrictions against the sale of liquor upon the premises. Rodeo Company answered, admitting the terms and conditions of its deed to the bank, but alleging no violation thereof, nor objection to the manner in which the property was being used, and seeking no affirmative relief. The Foundation answered and, by cross-complaint, alleged the terms and conditions of the deeds to plaintiff of lots 347 and 348, that intoxicating liquors were being sold thereon in violation thereof and sought to enforce the condition of the deeds as to lots 347 and 348, by compelling a conveyance thereof to the Foundation, with damages against plaintiff and cross-defendant Eaton, because of their failure to convey title and deliver possession upon breach of the condition of the deed.

The judgment, based upon findings presently to be discussed, provided that plaintiff's title to lots 348 and 349 was subject to the condition against the sale of intoxicating liquor, as contained in the deeds of the bank to plaintiff, declared the Foundation to be the owner in fee of lot 347 because of breach of the condition, and the owner of a reversionary estate in lots 348 and 349, based upon the conditions of the deeds, ordered plaintiff to deed lot 347 to the Foundation, and declared that the title to all three lots was subject to the said restriction and condition contained in the deed of lot 7, tract 3613, from Rodeo Company to the bank. The Foundation was also awarded damages against plaintiff and cross-defendant Eaton in the amount of the rental value of the property, lot 347. Plaintiff and Eaton appeal from the judgment.

The findings present this anomalous situation: Rodeo Company has never transferred, and is vested with the absolute estate in reversion in, lot 7 of tract 3613, which embraces lots 347, 348 and 349 of tract 7005. At the same time the findings declare that the Foundation is vested with the estate in reversion as to lots 348 and 349, and with the fee title to lot 347, all subject to the reserved title of Rodeo Company. The court decided that because of the breach of the condition against the sale of intoxicating liquor upon lot 347, contained in the bank's deed to plaintiff, the Foundation became entitled to reduce its supposed right of reversion to possession, and that Rodeo Company possessed the same right because of the violation of the condition contained in its deed to the bank. Title to the lot was decreed to be in the Foundation, and not Rodeo Company, because the former sought to enforce its supposed right, while Rodeo Company did not seek a decree of forfeiture.

No question is involved upon this appeal as to the right of the bank to restrict the use of the land which it sold. While there were other restrictions in the deeds, they are not involved in the case and no violation thereof was alleged. We are concerned only with the consequences of the breach of the restriction against the sale of liquor as declared by the judgment. The only possible basis for the remedy which has been applied would be the ownership of a reversionary estate by the Foundation in all three lots, based upon the particular

condition which is involved. Unless such an estate has been created in the Foundation by act of the parties, it has no existence, and the judgment is unwarranted. In deciding whether the reversionary interest exists we have only to ascertain what estates were created and how and in whom they were vested by the several deeds of the parties.

[1] The question is whether the bank, in conveying title to the lots to plaintiff, could reserve to itself an estate in the land which had theretofore been reserved by, and remained vested in, its own grantor. No case has been cited which answers this question, and we are assured by counsel that none is to be found. As we view the case, the answer lies in the simple truth that each of two persons cannot, at the same time, own, absolutely, a single estate in property. Applying pertinent provisions of the Civil Code relating to ownership (sections 669 to 703), we find that the estate of the Rodeo Company was a vested, perpetual, contingent, future interest held in absolute ownership. While the interest was contingent, it nevertheless was an estate in land, commencing in possession upon termination of the estate with which the company had parted (Civ. Code, § 768), and subject to transfer the same as a present interest (Civ. Code, § 699; Pavkovich v. Southern Pacific R. Co., 150 Cal. 39, 87 P. 1097, 11 Ann.Cas. 760). The estate granted by Rodeo Company to the bank, plus the estate reserved by the company, constituted the entire ownership. From the estate conveyed to it the bank could carve others, but it could not create in another, and no more could it appropriate or reserve to itself, an interest which was at all times in the absolute ownership of Rodeo Company. Therefore, as far as the one condition here involved is concerned, the entire ownership in the land was lodged in Rodeo Company and the bank, until the bank conveyed the lots to plaintiff, and in plaintiff and Rodeo Company from the time the former received her deeds from the bank. The bank reserved to itself or its beneficiary no interest in the land, by the same condition stated in its deeds, because it had not that interest to reserve, and the Foundation, as beneficiary of the trust, could acquire from the bank, as trustee, no interest which the bank did not own.

The findings that the Foundation is the owner of lot 347 and of a reversionary estate in lots 348 and 349, based upon the condition against the sale of intoxicating liquor, are without support in the evidence, and the judgment based upon those findings cannot stand.

Rodeo Land & Water Company is and at all times has been the owner of the right of reversion and right of re-entry upon breach of condition subsequently reserved in the deed of that company to Bank of America conveying lot 7 of tract 3613, of which lots 347, 348, and 349 are parts. We find nothing in the phraseology of the restriction or the condition relating to the sale of intoxicating liquor, as contained in the deed of Rodeo Company to the bank, which inclines us to doubt that, until waived or relinquished, they were valid and binding upon the grantee, its successors and assigns.

[2] The court found that Rodeo Company has never objected to or protested sales of intoxicating liquor upon the premises here involved. No claim of right or title based upon the condition of its deed has been asserted by this defendant, nor has it sought herein affirmative relief. On its behalf no brief has been filed. We are asked by appellants to hold that there has been a waiver by Rodeo Company of its right to enforce the condition of its deed and to claim a reversion of title. This we are not disposed to do upon the record which is before us, nor do we express any opinion one way or the other on this branch of the case. It is our purpose to reverse the judgment in its entirety. We are deciding only that Berkeley Hall School Foundation has no reversionary estate or title in or to lots 347, 348, and 349 of tract 7005 or either of them, based upon the condition and attempted reservation in the deeds of the bank to plaintiff, which we hold to be ineffectual.

Numerous other points are discussed in the briefs, but their decision is not necessary to a disposition of the appeal.

The appeals from an order denying motion for a new trial, from the order denying motion to vacate and set aside the judgment and conclusions of law and from the order amending judgment, are dismissed.

The judgment is reversed.

We concur: YORK, Acting P. J.; DORAN, J.

20 Cal.App.2d 731

COMSTOCK v. BOARD OF TRUSTEES OF COMPTON JUNIOR COLLEGE DIST. IN LOS ANGELES COUNTY et al.

Civ. 11162.

District Court of Appeal, Second District, Division 1, California.

May 8, 1937.

Schools and school districts ⇐141(5)

Probationary teacher of junior college district cannot be dismissed during school year simply by giving him notice of grounds for his dismissal, but statutory procedure for dismissing permanent teachers must be followed (School Code, §§ 5.650, 5.651, 5.653, 5.654, 5.680, as amended by St.1935, pp. 1886, 1887, 1884).

DORAN, J., dissenting.

Proceeding for writ of mandate by Edwin Walker Comstock against the Board of Trustees of the Compton Junior College District in Los Angeles County and others. From an adverse judgment, defendants appeal.

Affirmed.

Everett W. Mattoon, Co. Counsel, and W. B. McKesson, Deputy Co. Counsel, both of Los Angeles, for appellants.

Tanner, Odell & Taft and Robert A. Odell, all of Los Angeles, for respondent.

BISHOP, Justice pro tem.

The parties are agreed that the question presented on this appeal is entirely one of law, and that it is correctly expressed in these words: "Can a probationary teacher of a junior college district be dismissed during the school year simply by giving him notice of the grounds for his dismissal, or must the procedure for dismissing permanent teachers be followed?" They are also agreed that the answer to the question depends upon the interpretation to be placed upon section 5.680 of the School Code of the State of California (Stats. of 1929, appendix; Act 7519, Deering's Gen.Laws, 1931), as that section was amended in 1935 (Stats. of 1935, p. 1884) to read: "Governing boards of school districts shall have power and it shall be their duty to dismiss probationary employees during the school year for cause only, as in the case of permanent employees."

We are agreed that, due to previous interpretations of the same language in Code sections formerly in effect, the answer to the question is that the procedure prescribed for dismissing permanent teachers must be followed.

The plaintiff was a probationary employee of the defendant school district, a district with an average daily attendance of less than 60,000 pupils, when, in December, 1935, an attempt was made to dismiss him for causes other than his incompetency by giving him notice of the fact that a resolution had been passed dismissing him. As we may surmise from the question agreed upon, the procedure required by sections 5.561, 5.653 and 5.654 of the School Code (as amended by St. 1935, pp. 1886, 1887), for the dismissal of a permanent employee upon any of the grounds of dismissal set forth in section 5.650 of the Code (as amended by St. 1935, p. 1886), was not followed.

A reading of section 5.680, supra, at once reveals the uncertainty that gives rise to our problem. Does the phrase: "as in the case of permanent employees," govern a board in its manner of dismissal, or only furnish it, by reference, with the grounds on which a dismissal may be made? The same problem was created by the language of subsection (i) of section 1609 of the Political Code as it provided in 1923 that "Boards of school trustees * * * shall have power and it shall be their duty: * * * (i) To dismiss probationary teachers during the school year for cause only, as in the case of permanent teachers." Our problem was faced by the court in Alexander v. Manton Joint Union School Dist. (1927) 82 Cal.App. 330, 255 P. 516, when section 1609 of the Political Code was in effect, and the conclusion reached was that the provisions respecting the grounds for and procedure to be followed in case of a dismissal of a permanent teacher both applied to the dismissal of a probationary teacher. Expressions reiterating this conclusion are found in Blalock v. Ridgway (1928) 92 Cal.App. 132, 136, 267 P. 713, concerned with section 1609, supra, and in Thibaut v. Key (1932) 126 Cal.App. 32, 35, 14 P.(2d) 138, 15 P.(2d) 189, by which time the Political Code provisions in question had found their way into the School Code.

We see no objection to the interpretation thus placed upon the wording now employed in section 5.680, supra, sufficient-

ly strong to tempt us to a new construction.

The judgment authorizing a peremptory writ of mandate to restore the plaintiff to his position and pay him his back salary is affirmed.

I concur: YORK, Acting P. J.

I dissent: DORAN, J.



20 Cal.App.2d 648

In re BARTON'S ESTATE.

Civ. 10114.

District Court of Appeal, First District, Division 1, California.

May 1, 1937.

1. Appeal and error ⇐82(3)

Appellate court judgment rendered on appeal from order denying motion to vacate judgment under statutes would not be set aside on ground that it was void on its face because such order was not appealable, since an order denying motion to vacate judgment is appealable as a special order made after final judgment (Code Civ.Proc. § 663a; §§ 663, 963, as amended by St.1933, pp. 1881, 2472).

2. Appeal and error ⇐82(3)

Power to hear appeal from order denying motion to vacate judgment under statutes is a rule of practice and not one of jurisdiction which court may refuse to exercise in certain cases when appeal may be taken from original judgment (Code Civ.Proc. § 963).

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

On motion to vacate and set aside decision and judgment in the matter of the estate of Nettie E. Barton, deceased.

Motion denied.

Prior opinion, 60 P.(2d) 471.

Norman H. Elkington, of San Francisco, for appellants.

John Carfraie Birnie, Charles K. Harper, and William F. Herron, all of San Francisco, for respondents.

TYLER, Presiding Justice.

Motion to vacate and set aside the decision and judgment In the Matter of the Estate of Nellie E. Barton, Deceased, rendered by this court on August 24, 1936, and to recall the remittitur upon the ground that the court had no jurisdiction of the appeal. Estate of Barton (Cal.App.) 60 P.(2d) 471.

[1, 2] The judgment sought to be set aside involved two appeals, one of which was from an order denying a motion to vacate the judgment of the court which was made and entered notwithstanding the verdict. At the time of the hearing of the appeal no motion was made to dismiss for lack of jurisdiction of this court to entertain the same, and upon the rendition of the judgment an application was made to the Supreme Court for a hearing, which application was denied. In support of the present motion the claim is made that as the lower court granted a motion for judgment notwithstanding the verdict, an appeal should have been taken from such order and not from the order subsequently made denying a motion to set aside the order for judgment, which order, it is claimed, is not appealable, and as such fact affirmatively appears from the judgment, such judgment is void on its face and should be set aside. There is no merit in the claim. The appeal was taken under section 663 (as amended by St. 1933, p. 1881) and section 663a of the Code of Civil Procedure. The courts of this state have repeatedly held that an order denying a motion to vacate a judgment under these sections is a special order made after final judgment and expressly appealable as such under section 963 of the Code of Civil Procedure (as amended by St.1933, p. 2472). California Delta Farms v. Chinese American Farms, 201 Cal. 201, 202, 255 P. 1097; Los Angeles Soap Co. v. Bossen, 122 Cal.App. 237, 9 P. (2d) 900. The question raised is not one of jurisdiction. Courts have, as stated, power to hear such appeals under section 963 of the Code of Civil Procedure, though at times they may refuse to exercise such power in certain cases where an appeal may be taken from the original judgment. Title Ins. & Trust Co. v. California Development Co., 159 Cal. 484, 114 P. 838. Refusal to entertain such an appeal in cer-

tain cases is a mere rule of practice and is entirely apart from any question of jurisdiction.

The motion is denied.

We concur: KNIGHT, J.; CASHIN, J.



20 Cal.App.2d 677

OIL WELL CORE DRILLING CO. v. BARNHART et al.

Civ. 1818.

District Court of Appeal, Fourth District, California.

May 6, 1937.

1. Attachment ⇐5

Where agents, who entered into contract with principal to rent tools and equipment of principal and who were to receive one-third of the rentals as compensation, collected and retained rentals, collection and retention of rentals, though it may have been a tort, was also, in a sense, a breach of contract, as respects right to attachment.

2. Attachment ⇐6

Where agents, contrary to contract with principal, collected rentals due to principal, agents were under duty to pay over money to principal on demand, the law implying a promise to pay, as respects right to attachment.

3. Attachment ⇐6

Count alleging that agents had become indebted to principal for money had and received by agents for use and benefit of principal *held* sufficient in determining availability of attachment, without count alleging that agents entered into contract with principal to rent tools and equipment of principal and receive one-third of rentals as compensation, but that agents contrary to agreement collected and retained rentals.

4. Attachment ⇐6

Complaint alleging that agents collected and retained money due to principal *held* to disclose implied contract for direct payment of money so as to render attachment available.

5. Attachment ⇐8

Attachment will lie on cause of action for damages for breach of contract where damages are readily ascertainable by reference to contract and basis of computation of damages appears to be reasonable and definite.

6. Attachment ⇐8

Attachment would lie on claim for damages by principal against agents, where complaint alleged that definite amount of money belonging to principal was collected and retained by agents, and a reasonable and definite basis for computation of amount of claim appeared in the complaint and in contract between principal and agents.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by the Oil Well Core Drilling Company against S. W. Barnhart and others. From an order granting the defendants' motion to dissolve an attachment, the plaintiff appeals.

Reversed.

John J. Wilson and Joseph Doyle, both of Los Angeles, and Brittan & Mack, of Bakersfield, for appellant.

W. C. Dorris and R. W. Henderson, both of Bakersfield, for respondents.

BARNARD, Presiding Justice.

This appeal is from an order granting the defendants' motion to dissolve an attachment. The motion was granted on the ground that the attachment was improperly issued, "in that the cause of action as disclosed in the pleadings is not one on an express contract for the direct payment of money as alleged in the affidavit."

The complaint contains three counts. The first alleges that the defendants became indebted to the plaintiff for goods, wares, and merchandise sold and delivered in the sum of $15,000. The second count alleges that the defendants became indebted to the plaintiff for moneys had and received by the defendants for the use and benefit of the plaintiff in the sum of $15,000. The third count alleges the execution of a written contract; that under this contract the plaintiff was to furnish certain tools and oil well equipment which were to be rented and hired out to various people by the defendants; that the defendants were to receive one-third of the rentals and the plaintiff two-thirds; that certain bits were to be

sent to the plaintiff and sharpened at its place of business; that all compensation for sharpening said bits was to be retained by the plaintiff; and that all commissions due to the defendants were to be paid by the plaintiff at the end of each month. It is further alleged that the defendants rented and hired such tools and equipment to various persons, that contrary to the agreement the defendants collected rentals and caused bits to be sharpened at places other than the office of the plaintiff and collected the charges therefor, and that by reason thereof the defendants became indebted to the plaintiff in the sum of $15,000.

The first question presented is whether this action is upon a contract, express or implied, for the direct payment of money. The following language from the opinion in De Leonis v. Etchepare, 120 Cal. 407, 52 P. 718, is appropriate here: "That the relation between the parties created by the power of attorney is a contract relation is beyond question. Nor is the character of that relation, so far as defendant's duties and liabilities are concerned, affected by the alleged fact that it was created by or through the fraud of defendant. Moneys received by the agent are not his, and from the duty of the agent to pay over moneys received by him in that capacity the law implies a promise that he will do so upon demand, and a demand is duly alleged."

[1, 2] In that case the agent was authorized to collect the money for his principal, while in the instant case the contract provided that the appellant should pay certain commissions to the respondent, thus indicating that collections were to be made by the appellant. The respondent argues that his collecting and retaining any money was a tort rather than a breach of contract. There can be no doubt that the relation between these parties was that of principal and agent and that this relationship was created by the contract. The respondent was placed in a position to collect these moneys by reason of the contract. While his doing so may have been a tort it was also, in a sense, a breach of the contract. In any event, the respondent took money belonging to his principal to which he was not entitled. It was his duty to pay over this money upon demand, a demand is alleged, and the law will imply a promise to pay the same.

[3, 4] It was held in Powers v. Freeland, 114 Cal.App. 146, 299 P. 736, that where a cause of action for money had and received is joined with other causes of action sounding in tort and where it clearly appears that all counts refer to the same transaction, the nature of the action is to be determined by the more specific allegations of the counts sounding in tort. In that case it was necessary to prove the tort allegations before the common counts would be good. In the case now before us the second count was sufficient and the third count was unnecessary. In our opinion the allegations of the complaint herein, as well as those of the affidavit, disclose an implied contract for the direct payment of money.

[5] The respondent further argues that a writ of attachment could not be issued in this case because it appears from the complaint that a part of the amount demanded, the returns from sharpening bits which were retained by the respondent, is an unliquidated claim, that this part of the claim is one for damages for violation of the contract, and that neither the contract nor the complaint shows a basis for determining such damages. In Force v. Hart, 205 Cal. 670, 272 P. 583, 584, the court said: "It is a well-recognized rule of law in this state that an attachment will lie upon a cause of action for damages for a breach of contract where the damages are readily ascertainable by reference to the contract and the basis of the computation of damages appears to be reasonable and definite."

[6] If the portion of the demand which is here attached be considered as a claim for damages, a reasonable and definite basis for the computation of the amount thereof appears in the contract and complaint. Force v. Hart, supra. The complaint alleges that a definite amount of money belonging to the appellant was collected and retained by the respondent, and if the allegations are proved we think there is an implied contract for the direct payment of a specified sum of money within the meaning of the Code section.

No question is raised as to the sufficiency of the affidavit for attachment. The matter has been presented on the questions above discussed, and no other questions are here considered.

The order appealed from is reversed.

We concur: MARKS, J.; JENNINGS, J.

20 Cal.App.2d 591

ELLIOTT v. HASKINS et al.

Civ. 11336.
District Court of Appeal, Second District, Division 2, California.

April 29, 1937.

Rehearing Denied May 20, 1937.

Hearing Denied by Supreme Court June 28, 1937.

1. Searches and seizures ⇐7(1)

Constitutional provision against unreasonable seizures and searches was primarily designed to protect individual in the sanctity of his home and person and privacy of his books, papers, and property, but it does not prohibit reasonable rules and regulations adopted for exercise of police power of state (Const.Cal. art. 1, § 19).

2. Searches and seizures ⇐7(8)

Statute authorizing designation of unknown defendant in warrant by any name is a reasonable exercise of the police power and is not unconstitutional as authorizing an unreasonable seizure (Pen.Code, §§ 815, 819; Const.Cal. art. 1, § 19).

3. Searches and seizures ⇐7(8)

John Doe warrant issued pursuant to statute authorizing designation of unknown defendant by any name *held* valid as a reasonable exercise of police power as against contention of one arrested thereunder that it was void because violating constitutional prohibition against unreasonable seizures (Pen. Code, §§ 815, 819; Const.Cal. art. 1, § 19).

4. Searches and seizures ⇐7(2)

Fourth Amendment to Federal Constitution as regards seizures and searches applies only to federal government and its agents, and is not applicable in challenge to validity of arrest made under John Doe warrant issued pursuant to state law (Const. U.S. Amend. 4).

5. Arrest ⇐65

Arrest under warrant issued by justice of peace directed to any sheriff "in the state," where proper sheriff did receive warrant and executed it, and person arrested was not prejudiced, *held* not ground for complaint by person arrested, notwithstanding under statutes warrant should have been directed to any sheriff "in the county" (Pen.Code, §§ 815, 819).

6. Sheriffs and constables ⇐171

In action for false imprisonment against sheriff and bondsmen, contention that warrant was illegal because lacking indorsement for execution in county where plaintiff was arrested would not be considered where plaintiff did not cite evidence in record that any one executed the warrant in that county, since it was not court's duty on appeal to search for such evidence.

7. Sheriffs and constables ⇐157(4)

In action for false imprisonment against sheriff and bondsmen, where certificate on warrant for making return thereof was unexecuted, sheriff was nevertheless protected by warrant, as against contention warrant showed on its face there was no due return, since law did not require return to be made in that way and unexecuted certificate on warrant did not prove due return had not been made.

8. False imprisonment ⇐7(3)

Failure of officers making arrest to inform one arrested of intention, cause, and authority to arrest as prescribed by statute *held* not to subject officers to liability for false imprisonment (Pen.Code, § 841).

9. Appeal and error ⇐854(5)

Order granting motion for nonsuit was sustained as against contention that grounds set forth by defendant were insufficient to support his motion, in view of rule that appellate court will sustain a ruling of trial court granting a motion for nonsuit if it could have been granted on any grounds, but will not review a ruling denying a motion for nonsuit unless motion specifies particular grounds relied on.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Claude H. Elliott against H. E. Haskins and others. From a judgment for defendants, plaintiff appeals.

Affirmed.

W. Stuart Smith, of Santa Barbara, for appellant.

Edward A. Penprase, of Los Angeles, for respondents Haskins and New Amsterdam Casualty Co.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Bourke Jones, Deputy City Atty., all of Los Angeles, for respondents Haganbaugh, Tullock, Davis, Hess, and Doane.

CRAIL, Presiding Justice.

This is an action for damages for false imprisonment against defendant Haskins, sheriff of San Luis Obispo county, and his

bondsman, the casualty company; and against James E. Davis, chief of police of Los Angeles, and four of his arresting officers. The case was tried before a jury, but at the conclusion of the trial the court granted the motion of defendants for nonsuits and entered judgment thereon. The appeal is taken from the judgment.

In June, 1935, the plaintiff was arrested in Los Angeles by the police officers without any warrant and held on suspicion for three days. He was then taken by Sheriff Haskins and held two days. There was probable cause for plaintiff's arrest and no claim is made in the briefs to the contrary. The plaintiff urges other and less usual grounds for reversal.

The warrant of arrest used by Sheriff Haskins was a John Doe warrant which did not "particularly describe the party to be seized." The first and paramount contention of the plaintiff is that since the warrant fails to particularly describe the party to be seized, it is void on its face and illegally executed because it violates section 19 of article 1 of the California Constitution, following the language of Amendment No. 4 of the Federal Constitution, which reads as follows: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches, shall not be violated, and No warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The above language is a part of the Bill of Rights of the Federal Constitution.

[1] This constitutional provision was primarily designed to protect the individual in the sanctity of his home and person and the privacy of his books, papers, and property. But it does not prohibit reasonable rules and regulations adopted for the exercise of the police power of the state. 24 R.C.L. 704; 5 Cal.Jur. 695; 6 R.C.L. 197.

[2, 3] Authority to issue warrants in criminal proceedings in California is provided by section 815 of the Penal Code, which reads as folows: "The warrant must specify the name of the defendant, or, if it is unknown to the magistrate, the defendant may be designated therein by any name. It must also state the time of issuing it, and the county, city, or town where it is issued, and be signed by the magistrate, with his name of office." This section was enacted in 1872 and has been the law of the state ever since and in substance was the same as Criminal Practice Act, St.1851, p. 224, § 108. It has been accepted as a reasonable provision for the issuance of criminal warrants during all these years. We find nothing therein which justifies the view that it is an improper exercise of the police power.

[4] So far as Amendment 4 of the United States Constitution is concerned, it has long since been determined that it applies only to the federal government and its agents. People v. Mayen, 188 Cal. 237, 205 P. 435, 24 A.L.R. 1383; 24 R.C.L. 703, note 17.

[5] The plaintiff's next contention is that the warrant was void because it was issued by a justice of the peace and directed to any sheriff, constable, marshal, or policeman in the state. It is true that under section 819 of the Penal Code before its repeal became effective in September, 1935 (St.1935, p. 1526), the warrant should have been directed to any sheriff, constable, marshal, or policeman in the county in which it was issued, but the plaintiff cites us to no authority, which holds that a warrant so directed is absolutely void. The encyclopaedias and other large works on jurisprudence collect few, if any, cases on how a warrant should be directed, and none at all as to the effect of such a misdirection. But if the warrant was directed to all the sheriffs in the state, that direction included the sheriff of the county in which it was issued. The proper sheriff received the warrant and executed it. We can see no prejudice to the plaintiff by the misdirection and nothing therein to make the warrant ineffectual in the hands of the proper officer. "* * * nor does every slight defect render a warrant ineffectual. For example, a recital that a warrant is issued for a violation of a statute which is void does not render the warrant void, where it also recites the violation of a valid statute." 4 Am.Jur., Arrest, § 7.

[6] Plaintiff's next contention is that "the warrant was illegally executed by reason of the failure, apparent upon its face, to have it properly indorsed for execution in Los Angeles county where defendant Haskins executed it upon plaintiff." But, in this connection, the plaintiff does not cite us to any evidence in the

record that the defendant Haskins or any one else executed the warrant in Los Angeles county. It is not our duty on appeal to assume the task of searching for such evidence.

[7] Plaintiff's next contention is that defendant Haskins is not protected by the warrant for the reason that he failed to make due return thereof, and in this connection plaintiff by way of evidence cites us to the warrant only and says that the warrant shows upon its face that no return thereof was made. We have examined the transcript where indicated and find no evidence one way or the other in this regard, unless it be that a blank certificate printed on the warrant is not filled out. The plaintiff does not cite us to any law, and we know of none, which requires such a return in California.

[8] Plaintiff next contends that "the Los Angeles officers are liable upon failure at the time of making the arrest to perform their duty under section 841 of the Penal Code." This section provides in effect that the person making an arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it. Here again the plaintiff neglects to cite us to any authority that such failure to inform the defendant, if true, would constitute false imprisonment.

[9] The plaintiff also contends that the court erred in granting a nonsuit for the reason that the grounds set forth in the defendants' motion for nonsuit were insufficient to support such motion. In this behalf he relies upon the well-settled rule that "an appellate court will not review the ruling of the trial court denying a motion for a nonsuit upon any ground not precisely and specifically stated in the motion." Millar v. Millar, 175 Cal. 797, 798, 167 P. 394, 395, L.R.A.1918B, 415, Ann.Cas.1918E, 184. This contention is taken care of by the terse language found in Anchester v. Keck, 214 Cal. 207, 213, 4 P.(2d) 934, 936: "* * * the rule invoked by appellants has application only to cases in which the motion for nonsuit is denied, and not to an order granting it."

The plaintiff makes other contentions which are even less meritorious and which do not justify a discussion by this court.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, J.

ARNAUDO v. SUPERIOR COURT IN AND FOR SAN MATEO COUNTY et al.

Civ. 10517.

District Court of Appeal, First District, Division 1, California.

May 6, 1937.

Hearing Denied by Supreme Court July 1, 1937.

1. Justices of the peace ⇐138(12)

Justices' courts as well as courts of record have inherent power to amend and correct their records, so as to make them speak the truth with respect to actual entries and orders which have been made through inadvertence or error.

2. Justices of the peace ⇐159(10)

Appeal from judgment of justice's court *held* not dismissible on ground that record disclosed that judgment was rendered on December 26, notice of appeal filed on same day, and cash bond was not deposited until following January 2, which deposit was not made within five days as required by statute, where justice in affidavit before superior court stated that notice of appeal and order directing constable to pay into court cash that he held in lieu of attachment was made on December 28 and not on December 26 (Code Civ.Proc. § 978a, as amended by St. 1935, p. 1962).

3. Justices of the peace ⇐159(9)

Justice of the peace *held* authorized to direct the money which was held by constable as a cash bond to prevent levy of attachment to be paid into court in lieu of filing of required undertaking on appeal, as against contention that plaintiff who obtained a judgment had vested interest in money, and order deprived him of his property without due process, where deposit was sufficient to pay amount of judgment and costs (Code Civ. Proc. § 978).

Mandamus proceeding by Joseph Arnaudo against the Superior Court of the state of California in and for San Mateo County, department 1; Hon. Maxwell McNutt, Judge.

Writ denied.

Joseph F. O'Malley, of San Francisco, for petitioner.

Hugh F. Mullin, Jr., of San Mateo, and Joseph A. Branson, of Burlingame, for respondent.

TYLER, Presiding Judge.

Application for a writ of mandate to compel the Superior Court of San Mateo County to dismiss a certain action pending before it on appeal from a judgment of the justice's court wherein petitioner was plaintiff and one A. J. Francell was defendant, which judgment was in favor of petitioner and against said defendant in the sum of $167 with costs. Contemporaneously with the filing of the complaint in the action a writ of attachment was duly issued. Defendant in order to prevent the attachment of his property deposited with the constable the sum of $315 as a cash bond to release the attachment on the property. Thereafter the case came on for trial and plaintiff recovered judgment in the sum above named. The judgment was duly entered and defendant filed a notice of appeal. The petition alleges that defendant failed and omitted to file the required undertaking within the time necessary to make the appeal effective. It further appears from the petition that the justice of the peace before whom the action was tried and the judgment rendered made an ex parte order directing the constable to pay into his court the sum of $315 theretofore deposited by defendant for and on his behalf as a cash bond to prevent the attachment of his property, and in the order the justice stated that the same was to be a deposit on appeal from the judgment in lieu of a bond on appeal. A copy of the proceedings as they appeared in the docket of the justice's court was certified and transmitted by the justice to the clerk of respondent superior court with the papers on appeal and their respective dates of filing. From this record it appeared the judgment was rendered on December 26, 1936, and a notice of appeal filed the same day, and that the sum of $315 was not paid by the constable into court until January 2, 1937. Thereafter, on the 2d day of February, 1937, petitioner herein filed a motion to dismiss the appeal upon the ground that no proper or any undertaking was filed within five days as required by the provisions of section 978a of the Code of Civil Procedure (as amended by St.1935, p. 1962). The further claim was made that the justice had no power or authority to direct the money, held by the constable as a cash bond to prevent the levy of the attachment, to be paid into court in lieu of the filing of the required undertaking on appeal provided for by law. After hearing, respondent court refused to dismiss the appeal and the present proceeding was instituted by petitioner to compel it to do so.

[1-3] The same points are here urged in support of the petition as were argued in the court below upon the motion to dismiss. Upon the hearing of the motion to dismiss, the justice of the peace filed with the respondent superior court an affidavit of correction of his docket to the effect that the notice of appeal and the order directing the constable to pay into court the sum he held in lieu of the attachment was made on the 28th day of December, 1936, and not on the 26th of December. This being so, the deposit was made by the constable within the five-day requirement. It is well settled that justices' courts, as well as courts of record, have the inherent power to amend and correct their records so as to make them speak the truth with respect to actual entries and orders which have been made either through inadvertence or error. Wildenhayn v. Justice's Court, 34 Cal.App. 306, 167 P. 305; Williams v. California Milk Producers Association, 136 Cal.App. 172, 28 P.(2d) 59. Nor do we think there is any merit in the claim that the justice had no power to order the sum held by the constable under the circumstances narrated to be paid into court in lieu of a bond on appeal. In this connection petitioner argues that he had a vested interest in the sum and the order deprived him of his property without due process of law. Conceding his interest, the order in no manner affected or impaired any right he may have had to the property whether vested or contingent. Section 978 of the Code of Civil Procedure providing for a cash deposit on appeal provides that the amount shall be the sum of $100 plus the value of the property, including all costs. Plaintiff had judgment for the sum of $167 plus $30.10 costs. The amount therefore required by the provisions of section 978 of the Code of Civil Procedure would be the sum of $297.10 and the cash deposit of the sum of $315 more than satisfies this requirement. The giving of an additional bond under the circumstances would be an idle and useless act and work a hardship on appellant.

The writ is denied.

We concur: KNIGHT, J.; CASHIN, J.

20 Cal.App.2d 596

ORTEGA v. PACIFIC GREYHOUND LINES, Inc., et al.

Civ. 1827.

District Court of Appeal, Fourth District, California.

April 29, 1937.

1. Evidence ⇐150

Conditions surrounding test or experiment, such as an experiment to determine visibility of reflector at night, need not be identical with those existing at time of occurrence in question in order to be admissible in evidence, provided there is substantial similarity.

2. Evidence ⇐150

Admission of evidence obtained from test or experiment is largely discretionary with trial court.

3. Evidence ⇐584(1)

Test or experiment, result of which is introduced in evidence, is merely circumstance to be considered in connection with other evidence.

4. Evidence ⇐150

In action for death of boy who was struck by bus at night while he was riding bicycle, wherein question whether red reflex mirrors on rear of bicycle were sufficient under statute was in issue, admission of testimony of witness that during experiment he was able to see same kind of reflex mirrors on bicycle more than 200 feet ahead of his automobile *held* not reversible error, where bicycle used by deceased and reflex mirrors and their condition as to cleanliness were observed by jury (St.1923, p. 550, § 105).

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by Elena Cardenas Ortega against the Pacific Greyhound Lines, Inc., and others. From a judgment in favor of the plaintiff, the defendants appeal.

Affirmed.

Chester O. Hansen, of Fresno, for appellants.

Gerald H. Catania and David E. Peckinpah, both of Fresno, for respondent.

BARNARD, Presiding Justice.

The plaintiff brought this action to recover damages for the death of her minor son. The deceased was riding a bicycle in a southerly direction on United States highway 99 when he was struck by a stage owned by the first-named defendant and driven by the defendant Hansen. The accident occurred after dark on the evening of June 1, 1935. A jury returned a verdict in favor of the plaintiff, and this appeal followed the judgment.

The appellants concede that the evidence is sufficient to sustain the verdict, and the only point raised is that the court erred in permitting a witness to testify as to an experiment or test performed by him.

Section 105 of the California Vehicle Act (St.1923, p. 550), as then in effect, required that a bicycle operated on a highway after dark be equipped with a reflex mirror or a lamp exhibiting a red light plainly visible under normal atmospheric conditions for a distance of 200 feet toward the rear. The bicycle here in question had a flashlight attached to its front fork and a "Goodrich Safety League" emblem attached to its rear fender. This emblem was equipped with two red reflex mirrors. The bicycle was introduced in evidence and a deputy sheriff testified that it was in the same condition as when it was picked up at the scene of the accident.

This witness also testified that on the night before the trial he took a new Goodrich Safety League emblem exactly similar to the one above referred to and attached it to the rear fender of another bicycle; that a boy rode this bicycle along this highway while he followed in an automobile; and that as the bicycle was in motion going down the street he was able to see the reflector lights on the emblem at a distance of more than 200 feet. An objection was made to this evidence on the ground that it did not appear that the test was made under similar circumstances, in that there was "no evidence in the record as to the cleanliness of the buttons on the back of this bicycle or the position of the bicycle at that time." We take it that the latter part of this objection was that there was no evidence that the bicycle used in the test was in the same position as was the bicycle on which the deceased was riding at the time he was struck. All that the statute required was that such a bicycle carry at the rear a reflex mirror or lamp exhibiting a red light plainly visible under normal conditions for a distance of at least 200 feet. The test here was directed to the issue of whether or not the bicycle used by the deceased was so equipped, and

not to the position that the bicycle was in at the time it was struck.

[1-4] The conditions surrounding a test or experiment of this nature need not be identical with those existing at the time of the occurrence in question provided there is a substantial similarity. County of Sonoma v. Stofen, 125 Cal. 32, 57 P. 681. The admission of such evidence is largely a matter of discretion with the trial court, and such a test is merely a circumstance to be considered in connection with other evidence in the case. People v. Levine, 85 Cal. 39, 22 P. 969, 24 P. 631. The bicycle used by the deceased and the reflex mirrors thereon were before the jurors, who had an opportunity to observe their condition as to cleanliness. In so far as the particular objection raised is concerned, the foundation was sufficient to justify the admission of the evidence and the matter of its weight could have been and probably was argued to the jury. There is nothing before us to indicate that the surrounding circumstances were not substantially similar, and no reversible error appears.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.



PEOPLE v. RANKIN et al. *

Cr. 2943.

District Court of Appeal, Second District, Division 2, California.

April 23, 1937.

Hearing Granted by Supreme Court May 20, 1937.

1. Criminal law ⇐1144(13)

Evidence will be viewed most favorably to the prosecution on appeal from a conviction.

2. Criminal law ⇐511(2)

Under statute, conviction on accomplice's testimony cannot be sustained unless testimony is corroborated by other evidence which of itself and without aid of accomplice's testimony connects defendant with offense (Pen. Code, § 1111).

3. Criminal law ⇐510

Abortion convictions on accomplice's testimony which were not corroborated by other testimony would be reversed (Pen.Code, § 1111).

4. Criminal law ⇐511(2)

Abortion conviction *held* proper where accomplice's testimony was corroborated by other evidence tending to connect defendant with abortion (Pen.Code, § 1111).

5. Abortion ⇐6

Under abortion statute as it read April 29, 1935, people must allege and prove that woman upon whom abortion was performed was pregnant (Pen.Code, § 274).

6. Abortion ⇐5

Under statute, abortion count which failed to allege that woman upon whom abortion was performed was pregnant *held* fatally defective (Pen.Code, § 274).

7. Criminal law ⇐13

Statute prohibiting procuring of miscarriage *held* not unconstitutional as failing to inform defendant accused thereunder with reasonable certainty as to acts prohibited, since phrase "procuring miscarriage" was sufficiently explicit to inform persons of common intelligence and understanding of acts which were prohibited (Pen.Code, § 274).

"Miscarriage" is the expulsion of the ovum or embryo from the uterus within the first six weeks after conception. Between that time and before the expiration of the sixth month when the child may possibly live, it is termed "abortion." When the delivery takes place soon after the sixth month, it is denominated "premature labor." But the criminal act of destroying the fœtus at any time before birth is termed in law "procuring miscarriage."

[Ed. Note.—For other definitions of "Miscarriage," "Premature Labor" and "Procuring of Miscarriage," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

R. L. Rankin, James Beggs, William A. Byrne, Jesse C. Ross, and Valentine St. John and others were convicted for abortion, and the named defendants appeal.

Affirmed in part, and reversed in part.

Rosecrans & Emme and Bayard R. Rountree, all of Los Angeles, for appellant R. L. Rankin.

R. E. Parsons and Jerome O. Hughes, both of Los Angeles, for appellant Byrne.

*For subsequent opinion see 74 P.2d 71.

Charles A. Thomasset, of Los Angeles, for appellant Valentine St. John.

Clarence W. Hull and Sherman & Sherman, all of Los Angeles, for appellant James Beggs.

Abe Richman, of Los Angeles, for appellant Jesse C. Ross.

U. S. Webb, Atty. Gen., Bayard Rhone, Deputy Atty. Gen., Buron Fitts, Dist. Atty. Los Angeles County, and V. L. Ferguson, Deputy Dist. Atty., of Los Angeles, for the People.

McCOMB, Justice.

Defendants were accused by the grand jury of the county of Los Angeles of the crime of conspiracy to violate section 274 of the Penal Code, a felony, and in eight separate counts of having committed abortions. Defendants were tried jointly before a jury, whose verdicts were:

(1) Guilty:

R. L. Rankin, George E. Watts, J. O. Shinn, William A. Byrne, Grace Moore, Lillian Wilson, James Beggs, Jesse C. Ross	Counts I, II, V, VII, and IX
John A. Creeth, Valentine St. John	Counts I and V
Violette Pellegrini	Counts I, II, and V

(2) Not guilty:

Jessie Radcliffe, J. C. Perry	All counts

Defendants H. L. Houston, Bessie McCarthy, and Beatrice Bole were not apprehended and defendant W. Norman Powers entered a plea of guilty to count I of the indictment and testified on behalf of the state.

Defendants James Beggs, William A. Byrne, R. L. Rankin, Jesse C. Ross, and Valentine St. John alone appeal from the judgments and orders denying their motions for a new trial.

The appeal of defendant R. L. Rankin has heretofore been dismissed at his request.

[1] Viewing the evidence most favorable to the prosecution (People v. Dukes, 90 Cal.App. 657, 659, 266 P. 558), the facts in the instant case are: Defendants R. L. Rankin and George E. Watts owned, operated, and directed a series of offices, extending from Seattle, Wash., to San Diego, Cal., for the purpose of illegally performing abortions. The remaining defendants, with the exception of those who were acquitted by the jury, were employed by them in various capacities in connection with the conduct of their illegal business. In the course of their business and in pursuance of their conspiracy abortions were performed upon Gladys Duckworth, Peggy Nowell, and Josephine Peacock as alleged in counts II, V, and IX of the indictment.

A.

Each appellant urges reversal of the judgments on the ground *that there is no substantial corroboration of the testimony of his accomplices to show his participation in or connection with any of the crimes of which he was convicted.*

[2] The law is settled in California that a conviction cannot be sustained upon the testimony of an accomplice, unless it be corroborated by other evidence which tends to connect defendant with the commission of the offense charged in the indictment (section 1111, Pen.Code), and it is equally clear that the corroborative evidence necessary to comply with this requirement must of itself without the aid of the accomplice's testimony connect or tend to connect defendant with the commission of the offense charged. People v. Kempley, 205 Cal. 441, 455, 271 P. 478; People v. Janssen, 74 Cal.App. 402, 406, 240 P. 799; People v. Rokes (Cal.App.) 64 P. (2d) 746.

[3] Applying the foregoing rules to the instant case, we find with reference to the appellants Beggs, Ross, and St. John, that, after eliminating entirely the testimony of their accomplices, the record is completely devoid of any evidence even slight, which connects or tends to connect any of them with any of the crimes of which they were convicted. Since the judgments as to these appellants must be reversed for the foregoing reason, it is unnecessary for us to consider the other contentions which they have advanced.

[4] With reference to appellant William A. Byrne, we find a different situation. An examination of the record discloses that, after eliminating the testimony of his accomplices, there was substantial evidence considered in connection with such inferences as the jury may have reasonably drawn therefrom to connect him with the commission of the offense

charged, thus furnishing the necessary corroboration to the testimony of his accomplices. One example of such corroborative evidence is found in the testimony of Geraldine Gerding, secretary to the manager of the Ocean Center Building in Long Beach, who it is conceded was not an accomplice, to the effect that appellant Byrne, about July 29, 1936, paid rent for rooms used by some of his coconspirators in that city for the purpose of performing abortions. There is ample evidence of a similar nature; however, since no useful purpose would be subserved by setting the same forth in extenso, we refrain from further discussion of it. Thatch v. Livingston, 13 Cal.App.(2d) 202, 56 P.(2d) 549; Koeberle v. Hotchkiss, 8 Cal.App.(2d) 634, 48 P.(2d) 104; Leavens v. Pinkham & McKevitt, 164 Cal. 242, 245, 128 P. 399.

B.

Appellant Byrne relies for reversal of the judgments upon these additional propositions:

First: Count VII of the indictment did not charge a public offense.

Second: Section 274 of the Penal Code is unconstitutional in that it fails to inform a person charged thereunder with reasonable certainty as to what acts or actions are prohibited by it.

Appellant Byrne's first proposition is valid. On April 29, 1935, section 274 of the Penal Code read as follows: "§ 274. Administering drugs, etc., with intent to produce miscarriage. Every person who provides, supplies, or administers to any *pregnant* woman, or procures any *such* woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than two nor more than five years." (Italics added.)

Count VII of the indictment read as follows:

"Count VII.

"For a further and separate cause of action, being a different offense of the same class of crimes and offenses as the charges set forth in Counts II, III, IV and V hereof, and connected in its commission with the charge set forth in Count I hereof, the said defendants, R. L. Rankin, George E. Watts, John A. Creeth, G. O. Shinn, William A. Byrne, Valentine St. John, H. L. Houston, Bessie McCarthy, Grace Cole, Lillian Wilson, Jessie Radcliffe, James Beggs, Beatrice Bole, Jesse C. Ross, Violette Pellegrini, W. Norman Powers and J. C. Perry, are accused by the Grand Jury of the County of Los Angeles, State of California, by this indictment, of the crime of Abortion, a felony, committed prior to the finding of this indictment, and as follows:

"On or about the 29th day of April, 1935, at and in the County of Los Angeles, State of California, the said defendants, R. L. Rankin, George E. Watts, John A. Creeth, G. O. Shinn, William A. Byrne, Valentine St. John, H. L. Houston, Bessie McCarthy, Grace Cole, Lillian Wilson, Jessie Radcliffe, James Beggs, Beatrice Bole, Jesse C. Ross, Violette Pellegrini, W. Norman Powers and J. C. Perry, did provide, supply, administer, procure, use, and employ an instrument upon the person of one Dorothy Woods, a woman, with the willful unlawful and felonious intent then and there and thereby to procure the miscarriage of the said Dorothy Woods, said use and employment of said instrument to procure said miscarriage of said Dorothy Woods, a woman, not then and there being necessary to preserve the life of the said Dorothy Woods."

[5, 6] It is to be noted that the Penal Code section above quoted prohibited the aborting of a "pregnant" woman, unless the same was necessary to preserve her life. Count VII of the indictment, which attempts to charge the defendants with the commission of an abortion upon Dorothy Woods, failed to allege that she was "pregnant." Under section 274 of the Penal Code as it read April 29, 1935, it was incumbent upon the People to allege and prove that the woman upon whom the abortion was performed was pregnant. People v. De Vaughan, 105 Cal.App. 516, 518, 288 P. 113. Therefore count VII was fatally defective in this respect and failed to state a public offense.

[7] Appellant Byrne's final proposition is untenable. His entire argument is directed to the point that the words "procure the miscarriage of such woman" do not convey a definite and certain meaning. "Miscarriage" is thus defined in Bouvier's Law Dictionary, volume II, page 2221: "The expulsion of the ovum or embryo from the uterus within the first six weeks

after conception. Between that time, and before the expiration of the sixth month, when the child may possibly live, it is termed abortion. When the delivery takes place soon after the sixth month, it is denominated premature labor. But the criminal act of destroying the foetus at any time before birth is termed, in law, procuring miscarriage."

An almost identical definition will be found in Cyclopedic Law Dictionary, page 662, and substantially the same definition is given in each of the modern dictionaries of the English language. It is therefore evident that the phrase as used in the statute was sufficiently explicit to inform persons of common intelligence and understanding of the acts which were prohibited.

The judgments and orders denying the motions for a new trial relative to appellants James Beggs, Jesse C. Ross, and Valentine St. John are and each is reversed, and a new trial is ordered.

The judgments and orders relative to William A. Byrne on counts I, II, V, and IX are and each is affirmed, and the judgment and order on count VII as to this appellant are and each is reversed.

We concur: CRAIL, P. J.; WOOD, J.



20 Cal.App.2d 562

SELLMAN et ux. v. CROSBY et al.

CROSBY v. SELLMAN et al.

Civ. 10460.

District Court of Appeal, First District, Division 2, California.

April 27, 1937.

1. Mortgages ⇐335

That mortgagees had in past failed to exercise right to accelerate maturity of obligation, though mortgagors had failed to make monthly payments, *held* not waiver so as to preclude mortgagees from later exercising right for subsequent default in monthly payment, since failure of each month's payment amounted to new default (Civil Code, § 2924, as amended by St.1933, p. 1669).

2. Mortgages ⇐335

Acceptance of some of mortgagors' past-due monthly payments after mortgagees had recorded notice of election to exercise right to accelerate maturity of obligation *held* not waiver of default, since in absence of express agreement to contrary, creditor may accept partial payments of amount due without waiving default as to balance and without affecting rights under acceleration clause (Civ.Code, 2924, as amended by St.1933, p. 1669).

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Suit by C. G. Sellman and Grace Julia Sellman against Agnes Crosby and Joseph A. Abreu and N. C. Hopkins, individually and as trustees under trust deed, wherein Agnes Crosby filed a cross-complaint against the plaintiffs and M. Walker. From a judgment in favor of the cross-complainant, the cross-defendants appeal.

Affirmed.

Breed, Burpee & Robinson, of Oakland, for appellants.

Hill & Mays, of Oakland (E. Coke Hill, of San Francisco, of counsel), for respondents.

SPENCE, Justice.

Plaintiffs sought to set aside a sale under a deed of trust and to cancel the trustees' deed. Defendant Agnes Crosby, hereinafter referred to as defendant or respondent, filed a cross-complaint to quiet title. The trial court entered judgment decreeing that plaintiffs take nothing by their action and that defendant's title to the premises be quieted. Plaintiffs appeal from said judgment.

On October 5, 1926, plaintiffs executed a trust deed upon certain real property in the city of Oakland to secure their promissory note to defendant in the sum of $5,500. Principal and interest on said note were payable in monthly installments of $40 each on the 5th day of each month. The note provided, "In case any of said installments are not paid within thirty days after the same shall become due, then the whole balance of said principal sum shall immediately become due and payable at the option of the holder hereof without notice."

Plaintiffs made the payments at a bank for the account of defendant. Each payment was entered by the bank in a book held by plaintiffs showing the month to which the

payment was credited and the amount applied to principal and to interest. Between July, 1931, and January, 1934, plaintiffs failed to make eleven of the $40 payments due under the note. There were conversations and correspondence between the parties concerning these delinquencies and in January, 1934, plaintiffs assured defendant that they would make payments regularly each month and that they were expecting to win a certain lawsuit, in which event they would pay the total amount due out of the money received. Although plaintiffs did receive some money as they hoped, they failed to apply it upon their indebtedness to defendant. Plaintiffs did pay $40 per month to the bank on the 5th day of each month from January, 1934, to and including March, 1935, each of which payments was credited by the bank, as noted in plaintiffs' book, to the installment longest past due. Civ.Code, § 1479. Upon plaintiffs' failure to make a payment on April 5, 1935, defendant ascertained that the taxes on the premises had been permitted to go delinquent. On April 20, 1935, defendant recorded a notice of default and election to sell as required by section 2924 of the Civil Code (as amended by St.1933, p. 1669). In this notice, defendant gave notice of the exercise of the option to declare the entire indebtedness payable as provided in the acceleration clause of the note. Thereafter plaintiffs made a $40 payment in April and a similar payment each month until August, 1935, when the trustees' sale was held. Said payments were likewise credited to the installments longest past due. Defendant purchased the property on the sale for the sum of $4,985.56. The trial court found that said sale was legally made and honestly conducted and that the price obtained was fair and reasonable.

[1] The first contention made by appellants is that "the right to accelerate the maturity of an obligation is waived and lost by delay of fifteen months in exercising such right." There might be merit in this contention if the record showed a delay of fifteen months in exercising the right of acceleration, but there is no such showing in the present case. Appellants were in default on eleven payments including the payment due on March 5, 1935. They failed to make these payments, or any of them, within thirty days after March 5, 1935, and respondent was entitled to exercise her right under the acceleration clause, within a reasonable time after April 5, 1935. This she did by recording her notice on April 20, 1935. A somewhat similar situation was presented in R. G. Hamilton Corp., Ltd., v. Corum, 218 Cal. 92, at page 97, 21 P.(2d) 413, 415, and the court said, "The appellant, although making partial payments on her obligation, was in default in payments of principal, interest, and advancements for over twelve months, and each month a new and additional default was occurring. Under these circumstances respondents may not be regarded as impairing their right of acceleration, upon default in future payments or be regarded as waiving that right. Glas v. Glas, 114 Cal. 566, 46 P. 667, 55 Am.St. Rep. 90; Campbell v. West, 86 Cal. 197, 24 P. 1000; note, 5 A.L.R. 437, 439."

[2] Appellants also contend that "acceptance of installments after election to declare the whole sum due constitutes a waiver of default and of all resulting rights under the acceleration clause." This contention is based upon the fact that the bank accepted a $40 payment in each of five months following the recording of respondent's notice. It will be noted, however, that each of said payments was credited as above indicated and that there was no payment or tender of payment of a sufficient amount to cover all the delinquent installments. No authority has been called to our attention holding that a partial payment has the effect contended for and we know of none. Upon principle we are of the opinion that a creditor, at least in the absence of an express agreement to the contrary, may accept partial payments on the amount due without waiving the default as to the balance and without affecting his rights under the acceleration clause. In other words, no implied waiver results from the mere acceptance of such partial payments. Harris v. Whittier Bldg. & Loan Ass'n (Cal.App.) 63 P.(2d) 840; 41 C.J. 861, § 1055; note, 19 A.L.R. 284.

The last contention of appellants is that "the evidence shows that there was an express agreement by the defendant to waive the right of acceleration for these past defaults." It is sufficient to state that a review of the evidence fails to disclose any express agreement to waive either the defaults or the right of acceleration.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

20 Cal.App.2d 733

BICKFORD et al. v. LAWSON.

Civ. 5757.

District Court of Appeal, Third District, California.

May 8, 1937.

1. Appeal and error ⇐766, 786

Appeal from judgment for defendant on directed verdict in malpractice action would not be dismissed on ground that issues were unsubstantial and for appellants' failure to refer in their brief to pages and folios of transcript relied upon, where question was whether failure to use X-ray pictures constituted malpractice, and trial court excluded expert testimony for failure to qualify witnesses, and reading of entire record was necessary to determine whether trial court abused his discretion in excluding expert testimony (Rules for the Supreme Court and District Courts of Appeal, rule 8, §§ 2, 3).

2. Appeal and error ⇐758(3)

Alleged error in striking out physician's testimony and in granting motion for directed verdict in malpractice action and in failing to admit evidence as to methods of treating particular type of fracture and use of X-rays in vicinity, though not in strict compliance with rule requiring designation of issues involved on appeal, *held* sufficiently to inform Court of Appeal of errors relied upon (Rules for the Supreme Court and District Courts of Appeal, rule 8, §§ 2, 3).

Appeal from Superior Court, Glenn County; R. M. Rankin, Judge.

Suit by Mollie Bickford and another against F. M. Lawson. From a judgment entered on a directed verdict for defendant, plaintiffs appeal, and defendant moves to dismiss the appeal or to affirm the judgment.

Motion denied.

Wright L. Callender and H. W. McGowan, both of Willows, for appellants.

George R. Freeman and Elmer Laine, both of Willows, for respondent.

PER CURIAM.

The respondent has moved to dismiss the appeal or affirm the judgment under the provisions of rule 8, sections 2 and 3, Rules for the Supreme Court and District Courts of Appeal of California, after the filing of appellants' opening brief, for failure to print therein a concise statement of the issues, because a sufficient reference to the subject-matter relied upon in the transcript has not been designated, and for the reason that the issues involved are so unsubstantial as to require no further argument. The appeal was perfected from a judgment which was rendered in favor of the defendant pursuant to a verdict which was directed by the court at the close of plaintiffs' evidence adduced at the trial.

This is a suit for damages based on alleged malpractice of a physician in the setting of a broken leg. Objections to the expert testimony of three physicians, which was offered by the plaintiffs, were sustained on the ground of a failure to qualify the witnesses to testify regarding the usual practice of the profession in that vicinity with respect to the reducing of a bone fracture. The chief question is whether accepted professional practice in that vicinity required the previous use of X-ray pictures to ascertain the position of the fractured bones. On motion of the defendant the court also struck from the record the testimony of one other physician for the lack of evidence of his knowledge of the usual practice in that community.

[1] While the appellants' opening brief is open to criticism for failure to quote or specifically refer to the exact pages and folios of the transcript upon which they rely, we are not disposed to technically enforce the rule for the reason that this particular appeal will require a reading of the entire record to determine whether there is substantial evidence of the qualifications of the expert witnesses so as to constitute an abuse of discretion on the part of the trial judge in excluding their testimony. We are unable to say without a critical examination of the record whether the issues presented on appeal are or are not unsubstantial. The essential question appears to be whether the mere failure to use X-ray pictures may be said to constitute malpractice under the circumstances of this case. We are of the opinion this is not an unsubstantial issue.

[2] On the first printed page of the brief, under the heading, "Index to Subject Matter * * * The Issues," the following statement appears:

"I. Error was prevalent in first striking out Dr. Harlan's testimony, and then in granting the motion for a directed verdict.

"II. The Court erred in failing to admit evidence as to methods of treating this type of fracture and the use of X-rays in the vicinity."

While this is not a strict compliance with the rule with respect to the requirement to designate the issues involved on the appeal in all of its particulars, it does sufficiently inform the court of the errors relied upon.

The motion is denied.



20 Cal.App.2d 728

CRUZEN v. WILCOX et al.

Civ. 11182.

District Court of Appeal, Second District, Division 1, California.

May 8, 1937.

1. Appeal and error ⇐757(1)

Ground of appeal stated in statement of questions involved as misconduct of court supported by undenied affidavits *held* without merit, where affidavits offered were categorically denied.

2. Appeal and error ⇐757(1)

Ground of appeal stated in statement of questions involved as refusal of court to receive evidence of lack of operator's license *held* without merit, where record failed to disclose that appellant was denied right to prove that no license had been issued to driver in question.

3. Automobiles ⇐171(1)

Where portion of double street consisting of two traveled portions separated by private right of way lay within city and remainder lay within unincorporated territory, intersection of another street with such double street *held* an "intersection" within provision of Vehicle Act relating thereto (St. 1929, p. 510, § 23).

[Ed. Note.—For other definitions of "Intersect; Intersection," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by Alva Cruzen against Fred Wilcox and another. From a judgment for defendants and from an order denying a new trial, plaintiff appeals.

Judgment affirmed, and appeal from order dismissed.

E. T. Young, of Los Angeles, for appellant.

Parker & Stanbury and Vernon W. Hunt, all of Los Angeles, for respondents.

BISHOP, Justice pro tem.

This appeal was brought by the plaintiff following his unsuccessful appeal to the jury to award him a verdict for the damages he suffered as a result of a collision between his automobile and an automobile driven by one defendant and owned by the other. We find no reason to reverse the judgment.

[1] Three grounds are presented by the plaintiff in support of his appeal. The first, as given in his statement of questions involved, is: "Misconduct of the court supported by undenied affidavits is assigned." As the only affidavits we have discovered are categorically and emphatically denied, there is no merit in plaintiff's first point.

[2] One of the two "main errors" listed in plaintiff's statement of questions involved is "the refusal of the court to receive evidence of the lack of an operator's license, as bearing on his negligence and lack of qualification as a driver." Again, the record does not support the premise of plaintiff's argument. The defendant driver testified that he had an operator's license. No ruling of the trial court appears which thwarted any effort of the plaintiff to prove that no operator's license had ever, in fact, been issued to the defendant driver or that the one issued had been, in fact, canceled or suspended. The witness answered "No" to plaintiff's question: "You hadn't been examined as to your competency as a driver within the last five years before the accident, had you?" There appears to be no refusal of the court to receive evidence on the subject of defendant's possession of a license.

The consideration we have given this, the first of plaintiff's "main errors," is not to be taken as indicating that we believe the presence or absence of a driver's license to be of any moment in the case, not even to the limited extent approved in Moore v. Re (1933) 131 Cal.App. 557, 22 P.(2d) 45. The record before us does not require an expression of our opinion on the matter.

[3] The other of the two "main errors" is, first of all, an attack upon the conclusion reached in Kienlen v. Holt (1930) 106 Cal.App. 135, 288 P. 866, Lowenbruck v. Stiglmeier (1935) 7 Cal.App.(2d) 204, 46 P.(2d) 251, and Driscoll v. Shipp (1936) 13 Cal.App.(2d) 591, 57 P.(2d) 177, that the intersection of a street with a double street, that is, one whose two traveled portions are separated by a private right of way, constituted but one intersection, within the meaning of section 23 of the California Vehicle Act (Stats.1929, p. 510) in effect early in the year 1935. We see no reason to question the correctness of the conclusion already thrice pronounced.

Plaintiff would distinguish this case from those just cited on the ground that here the northerly portion of the double highway was in unincorporated territory, while the southerly roadway, lying on the opposite side of the railroad right of way, was in the city of Pasadena. We fail to find in this a distinction. Both portions were traveled highways, in use under conditions supporting an inference that they were public highways, and the fact that one public body governed one portion and another the other would not, perforce, make two intersections grow where, but for the presence of a political boundary line, there would be but one.

The judgment is affirmed. The appeal from the order denying a new trial is dismissed.

We concur: YORK, Acting P. J.; DORAN, J.



20 Cal.App.2d 608

WILSON v. McLAUGHLIN et al.

Civ. S. C. 19.

District Court of Appeal, Second District, Division 1, California.

April 30, 1937.

1. Mortgages ⇐295(1)

Where owner of half interest in trust deed as beneficiary acquired title to the land, her interest as beneficiary and share in the debt were merged in title to land, lien of trust deed remained in force, and entire land stood as security for payment of remaining half of trust deed debt.

2. Estates ⇐10(1)

Equity will intervene to prevent merger of separate estates held in single ownership only where some right or just advantage would be lost to owner of two estates if lesser were merged in greater estate.

3. Mortgages ⇐283(1)

Where grantee of mortgaged land assumes and agrees to pay mortgage, grantee becomes principal debtor and grantor becomes surety on mortgage debt.

4. Mortgages ⇐8

Trust deeds given only as security are essentially identical with mortgages with power of sale, except in so far as express terms of trust deed differentiate it from mortgage or purposes of law require differentiation.

5. Mortgages ⇐138

Title of trustee under trust deed is limited by contract of parties and is essentially a power over property whereunder trustor retains all other rights and privileges of ownership, rather than ownership of interest therein.

6. Mortgages ⇐298(4)

After payment of debt secured by trust deed, title of trustee is nugatory.

Appeal from Superior Court, Los Angeles County; H. S. Gans, Judge.

Action by Birdinia J. Wilson against R. D. McLaughlin and Anna M. Threw, as executors of the Estate of Maud Jones Nelson, deceased. From a judgment for plaintiff, defendants appeal.

Affirmed.

W. Eugene Henry and R. D. McLaughlin, both of Los Angeles, for appellants.

H. Sidney Laughlin, of Los Angeles, for respondent.

SHINN, Justice pro tem.

On December 7, 1922, Elon A. Nelson gave to Anna N. Ivey his six promissory notes for the sum of $5,000 each, due ten years after date, and secured the same by his deed of trust of real property. Following the death of Mrs. Ivey her estate, including the six notes, was distributed in equal shares to her two daughters, plaintiff

Birdinia J. Wilson, and Maud Jones Nelson, wife of Elon A. Nelson. Defendants are executors of the estate of Maud Jones Nelson, deceased.

After the death of Mrs. Ivey, Elon A. Nelson conveyed to Maud Jones Nelson the real property which was subject to the trust deed. In this action by Birdinia J. Wilson to quiet her title to the notes and the security, the court held that by virtue of the deed to Mrs. Nelson, her interest as beneficiary under the trust deed became merged in her title to the property, and that the effect of the transaction was to extinguish the debt to the extent of $15,000, thus leaving Birdinia J. Wilson as the owner of the notes, having an unpaid balance of $15,000, and interest, still secured by the deed of trust.

[1-3] Upon their appeal the executors contend that there was no merger or partial extinguishment of the debt, and that therefore the estate owns a one-half interest in the whole thereof. The trial court correctly held that the undivided interest of Mrs. Nelson as beneficiary under the trust deed was merged in the fee title which she received from her husband. This resulted by operation of law. There are many instances in which equity will intervene to prevent a merger of separate estates held in a single ownership, but they are all cases in which some right or just advantage would be lost to the owner of the two estates if the lesser were merged in the greater. Darrough v. Herbert Kraft Co. Bank, 125 Cal. 272, 57 P. 983; Hines v. Ward, 121 Cal. 115, 53 P. 427; Anglo-Californian Bank v. Field, 146 Cal. 644, 80 P. 1080; Davis v. Randall, 117 Cal. 12, 48 P. 906; Brooks v. Rice, 56 Cal. 428; Scrivner v. Dietz, 84 Cal. 295, 24 P. 171. The principle of these equitable rules has no application to the facts in evidence. The deed to Mrs. Nelson recited as follows: "It is expressly agreed that as a consideration for the within conveyance, the Grantee herein expressly assumes and agrees to pay and discharge a mortgage in the sum of $30,000.00, now against the property, together with accrued interest thereon, as well as all taxes and special assessments levied or to be levied against the above-described property." Thus she became the principal debtor and her grantor a surety. Williams v. Naftzger, 103 Cal. 438, 37 P. 411; Tulare County Bank v. Madden, 109 Cal. 312, 41 P. 1092; Small v. C. R. Rogers Productions, 11 Cal. App.(2d) 191, 53 P.(2d) 774, and cases there cited.

The executors point out that if no merger took place, by reason of the extinguishment of one-half of the debt, the estate would be entitled to receive one-half of the proceeds of the sale of the property under a foreclosure of the trust deed, whereas under the judgment, which declares that the estate's interest as beneficiary has been merged in the legal title to the property, the lien of the trust deed remains in full effect, and the entire property stands as security for the payment to plaintiff of the unpaid balance of $15,000. But this status, established by the judgment, is as it should be. Mrs. Nelson obligated herself to pay the entire debt of $30,000, which means that she agreed to pay plaintiff the principal sum of $15,000, which was plaintiff's share of the notes. If the property had been sold for an insufficient amount to liquidate the debt in full, Mrs. Nelson would have been liable for the deficiency. Her obligations have not been increased by giving effect to the merger of the beneficial interest with the fee, and there is no reason why they should be diminished, if they could be diminished, by a refusal to give effect to the merger.

[4-6] It is contended by the executors that when a beneficiary under a trust deed, given as security for the payment of a debt, acquires the estate of the trustor in the property held in trust, no merger of the two interests occurs, for the reason that the legal title remains in the trustee until it is reconveyed, although it is conceded that in the case of a mortgage a merger generally takes place where the mortgagee acquires the estate of the mortgagor. The claimed distinction between a trust deed and a mortgage has no substantial foundation. Trust deeds given only as security are in substance but mortgages with power of sale. Sacramento Bank v. Alcorn, 121 Cal. 379, 53 P. 813; MacLeod v. Moran, 153 Cal. 97, 94 P. 604; Bank of America, etc., Ass'n v. Bank of Amador County, 135 Cal.App. 714, 28 P.(2d) 86. The title of the trustee is limited by the contract of the parties thereto. It is held as security only, and is essentially a power over the property rather than the ownership of an interest therein. It is a legal title in the sense that the trustee may convey title upon exercising the power of sale, free from any equity of redemption of the trustor, but, except for the exclusive powers expressly conferred upon the trustee, the trustor retains and may exercise all of the rights and privileges of ownership.

Conlin v. Coyne (Cal.App.) 64 P.(2d) 1123. After the debt has been paid, the apparent title of the trustee is a mere empty shell. To consider it as anything more than this would reverse the principle that the law recognizes substance rather than form. In so far as the express terms of a trust deed differentiate it from a mortgage, or the purposes of the law require differentiation, a trust deed must, of course, be distinguished from a mortgage, but in other respects they should be considered as essentially the same, for their general purposes are identical. As pointed out by Justice Shenk in Bank of Italy, etc., Ass'n v. Bentley, 217 Cal. 644, 20 P.(2d) 940, the substantial rights of the parties should not be altered because of the more or less accidental form which the security takes. For the foregoing reasons we conclude that when Mrs. Nelson, as creditor to the amount of $15,000, became her own debtor in that amount, the debt was extinguished to that extent and her beneficial interest in the property, founded upon that debt, became merged in the title which she acquired from the trustor.

The judgment is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.



PEOPLE v. GANAHL LUMBER CO. *

Civ. 11045.

District Court of Appeal, Second District, Division 1, California.

May 7, 1937.

Rehearing Denied June 4, 1937.

Hearing Granted by Supreme Court July 1, 1937.

1. Eminent domain ⇐205

Where lease from railroad for erection of lumber yard and plant provided for termination on 30 days' notice and was executed contemporaneously with contract whereby railroad agreed to rebate sum paid for installment of spur track to leased property at stipulated rate for each carload of freight shipped, and railroad attempted to terminate lease before institution of condemnation action and before sum paid for installation of spur track had been rebated, evidence explaining apparent conflict in provisions of lease and contract *held* to support award of damages to lessee for unexpired term as ascertained from entire lease agreement.

2. Eminent domain ⇐150

$25,092 damages to lessee for condemnation of easement over land used by lessee for lumber yard and plant *held* not excessive, under evidence, where lessee had unexpired term of 22 years and 11 months, had paid $2,600 to railroad for installation of spur track to leased property under contract whereby railroad agreed to rebate $2 per carload of freight shipped by lessee, who had received $278 through rebates.

HOUSER, P. J., dissenting.

Appeal from Superior Court, Santa Barbara County; Wm. D. Dehy, Judge.

Action by the People, acting by and through the Department of Public Works, against the Ganahl Lumber Company. From a judgment for defendant, plaintiff appeals.

Affirmed.

Clarence W. Morris and Lincoln V. Johnson, both of San Francisco, for the People.

Schauer, Ryon & McMahon, of Santa Barbara, Thomas F. Murphine, of Los Angeles, and Robert W. McIntyre, of Santa Barbara, for respondent.

YORK, Justice.

This is an appeal from a judgment rendered in an action in eminent domain brought by the state to condemn an easement for highway purposes over certain real property, situate in the city of Santa Barbara, owned by the Southern Pacific Company (hereinafter referred to as the railroad company), and occupied by respondent corporation as a lumber yard and plant; the appellant's main point being that no damage was proved or at least, that the amount of damage found is grossly excessive. The complaint is in the usual form used for actions of this character and alleges that respondent corporation claims some right, title, or interest in real property by reason of a purported unrecorded lease; and further that said lease has expired and that respondent corporation has no right, title or interest in or to the said real property or any part thereof. The answer admits the formal allegations of the complaint as to public necessity; denies that respondent has no interest in the property sought to be condemned; and affirmatively alleges a lease-

*For subsequent opinion see 75 P.2d 1067.

hold interest in the land under a lease which has an unexpired term of 25 years.

It appears from the record that in June of 1925, L. A. Ganahl as agent for and president of respondent corporation entered into negotiations with the railroad company for the leasing of a suitable piece of property in the city of Santa Barbara for the establishment of a lumber yard and plant; during the course of these negotiations, it was represented to him that, while the lease itself would be on the standard printed form of lease used by the railroad company which contained a provision that the lease could be terminated on 30 days' notice, it would be necessary for him, in order to secure the lease, to enter into a spur-track agreement with the railroad company. The lease as finally executed provided for a term of one year from December 1, 1925, at a rental of $50 per month, payable in advance, any holding over of the term to be deemed to be on a month to month basis. Under the spur-track agreement the railroad company was to install the spur track adjacent to the land covered by the lease upon payment to it by respondent of the sum of $2,600, the estimated cost of such installation. It further provided that approximately $1,016.21 of the sum advanced by respondent would be rebated to it at the rate of $2 for each carload of freight shipped over the spur track by respondent. At the time of trial of the action the evidence showed that the sum of $278 had been rebated to respondent leaving unrefunded a balance of $738.21.

As has been stated, negotiations were commenced in June of 1925, the spur-track agreement bearing date of July 24, 1925, and the lease bearing date of December 22, 1925. However, owing to considerable delay incident to a controversy with the city of Santa Barbara over rezoning the property covered by the lease, it was not until February 15, 1926, that the lease and the spur-track agreement were finally executed and delivered to and by both parties. Subsequently, apparently relying upon its lease and agreement with the railroad company, respondent invested approximately $40,000 in permanent improvements upon the leased land and established an efficient lumber yard, building supply, and planing mill plant, constituting an integral operating unit, which was so used until January 24, 1934, when railroad company caused to be served upon respondent notice of termination of the lease. This action was commenced on April 12, 1934; construction of a three-lane main state highway across a part of the land occupied by respondent was begun on June 6, 1934, and on June 8, 1934, a new lease was entered into between respondent and the railway company concerning the remaining land, and which was other than that involved in this action.

In addition to the lease and spur-track agreement, there was introduced at the trial of the action much correspondence which had passed between the parties to these agreements. At the conclusion of the trial the court found that the Ganahl Lumber Company on the 12th day of April, 1934, "was the owner of a leasehold interest in and to certain property theretofore leased to it by Southern Pacific Company * * * that on the said 12th day of April, 1934, the said leasehold interest of Ganahl Lumber Company had an unexpired term of twenty-two years and eleven months and that on the said 12th day of April, 1934, and for a long time theretofore, the said defendant Ganahl Lumber Company had established on its said leasehold interest from Southern Pacific Company and was the sole owner of a coordinated, synchronized, perfected and efficient lumber, planing mill and building material supply plant consisting of a planing mill with machinery therein attached to and forming a part of the buildings containing said planing mill and affixed and attached to the real property so leased by Ganahl Lumber Company and being part and parcel thereof; * * * that the spur-track * * * was constructed upon a narrow strip of land * * *; that said narrow strip of land and spur-track thereon were appurtenant to and appurtenances of the land leased as herein found to Ganahl Lumber Company * * * and necessary for efficient use and operation of the said leased property; the Court further finds that during the year 1934 the Southern Pacific Company contrary to the terms of said spur-track and lease agreement endeavored to cancel the same by the service of notice purporting to do so; that at the time of the said purported attempt to cancel and terminate said lease and spur-track agreement Ganahl Lumber Company, defendant herein, was not in default thereunder and had complied with all conditions, terms and agreements on its part to be performed under said lease and spur-track agreement, and that the attempted cancellation and termination was ineffective and of no force and effect what-

ever, and that on the said 12th day of April, 1934, the said lease and spur-track agreement between Southern Pacific Company and Ganahl Lumber Company, as heretofore found herein to exist, was in full existence and effect with an unexpired term thereof of twenty-two years and eleven months to run therefrom and thereafter, and that defendant Ganahl Lumber Company had and has at all times fully complied with all terms, conditions and agreements in said spur-track and lease agreement on its part to be kept, fulfilled and performed."

As conclusions of law from said findings, the court found that the plaintiff was entitled to a decree in condemnation, upon the payment into court for the defendant the sum of $25,092, together with 7 per cent. interest thereon from the 12th day of April, 1934, to date of deposit.

Appellant claims that the spur-track agreement and the lease cannot be construed together, for the reason that the subject-matter of each is separate and distinct from the other, and that the spur-track agreement cannot extend the term of the lease until the full rebate under the spur-track agreement has been received.

[1] Obviously, the two instruments have reference to the same transaction, i. e., the establishment of an efficient lumber, planing mill, and building material supply plant upon the property covered by the lease, appurtenant to which and as a necessary adjunct thereto the spur-track was installed. The evidence shows that railroad company would not give the lease without the spur track; that the lease on a standard printed form provided for cancellation on thirty days' notice, while the spur-track agreement provided that the respondent should pay $2,600 for the construction of the track and that the sum of $1,016.21 should be repaid by the railroad company to respondent in the form of rebates at the rate of $2 for each carload of freight shipped by respondent. It was found by the court, and we believe justly, that the lease and spur-track agreement were in full existence on the 12th day of April, 1934, with a term of twenty-two years and eleven months to run. There was ample evidence introduced to support the findings of the trial court and to explain the apparent conflicting provisions contained in the two instruments.

[2] Upon the conflicting testimony of several expert witnesses, the jury fixed the damages to respondent corporation at the sum of $25,092. This we cannot disturb because it is directly supported by evidence. Such other points as have been raised by appellant, we believe are without merit.

The judgment appealed from is affirmed.

I concur: DORAN, J.

HOUSER, Presiding Justice (dissenting).

I dissent. For the purpose of determining whether the lease was terminated by the notice of its cancellation that was given by the railroad company to Ganahl Lumber Company. It may be conceded that the provisions of the lease should be considered together with those of the spur-track agreement. Nevertheless, it is undeniable that, although the lease expressly and specifically provides for the manner of its cancellation, the spur-track agreement is absolutely silent even on the subject of *its* cancellation, to say nothing of the cancellation of the lease. For aught that appears in the agreement, its existence might continue indefinitely. True, it does contain a provision to the effect that the Ganahl Lumber Company is entitled to a rebate of approximately $1,000 on account of the cost of the construction of the spur-track and which rebate is to be made by an allowance of $2 per car of lumber, etc., that may be delivered to Ganahl Lumber Company over the spur track. However, to my mind, that fact, together with the assumed estimate of the respective parties to the agreement to the effect that at the rate of $2 per car it would take 35 years to pay the amount of the rebate, furnishes no sufficient ground for rejecting and disregarding the plain language of the lease that it might be canceled on a thirty-day notice to that effect. In itself, and giving the utmost available force to the arrangement concerning the payment of the rebate, at most, it amounts to nothing more than a possible implication that the duration of the spur-track agreement might extend for a period of 35 years. Inasmuch as the number of cars of lumber that would be shipped over the spur track was not only undetermined, but also was indeterminable, it is clear that the period of time that would be required to pay the full amount of the rebate was entirely speculative; and as a consequence, that that obligation might be discharged much faster, or even much slower than the parties to the agreement anticipated that it would be paid. Hence, as against and contrary to the express language of the

lease, by which the railroad company was given the right to terminate it on a thirty-day notice, to rule that by the indefinite understanding of the parties to the agreement a definite term was fixed, is to place a construction upon the entire agreement with which I am unable to agree. From the entire situation, it is perfectly consistent to conclude that the intention of the parties was that, although it was *within the power* of the railroad company to cancel the lease on a thirty-day notice to that effect—until such cancellation occurred, the railroad company would pay to Ganahl Lumber Company a rebate of $2 for each car of lumber that was delivered to it over the spur track, until the sum of $1,000 had been thus paid, regardless of the length of time that might be consumed in that manner.

Furthermore, a review of the pertinent evidence is convincing that the amount of the award of damages is grossly excessive.



20 Cal.App.2d 477

BOENS v. BENNETT.

Civ. S. C. 11.

District Court of Appeal, Second District, Division 1, California.

April 22, 1937.

Hearing Denied by Supreme Court June 21, 1937.

1. Divorce ⇐290

Divorce decree entered against nonresident wife on substituted service by mailing and publication, awarding husband custody of minor son who was outside territorial jurisdiction of court, *held* not to preclude son from maintaining subsequent separate action against father for emancipation and to enforce father's duty to support, since court in divorce action did not acquire jurisdiction to make orders concerning custody of minor children, the summons being merely a notice prescribed by statute in interest of fairness to rebut idea that proceeding was secret and not writ to bring wife into court (Civ.Code, § 203).

2. Parent and child ⇐3(1)

Father *held* not required to send son above age of 16 years to college regardless of father's financial circumstances, since father was entitled to decide extent of education of child beyond education provided by school systems of state, unless father's parental authority had been taken away by the courts (Civ.Code, § 203; School Code, § 1.130 et seq.).

3. Evidence ⇐588

Trier of facts has responsibility to reconcile, if possible, any apparent conflict in evidence whether conflict arises from entire case or in testimony of single witness and to effectuate all evidence when nature of case will admit of such disposition, or if conflict is irreconcilable, to place value on contradictory evidence.

4. Appeal and error ⇐1011(1)

In minor son's action against father for emancipation and to enforce father's duty to furnish support and education, trial court's decision on conflicting evidence on issues whether son was entitled to enforcement of father's duty to support and son's emancipation from father by retention of earnings so as to relieve father from liability to support *held* binding on reviewing court.

5. Appeal and error ⇐931(1), 996

All intendments are in favor of findings and judgment arrived at on conflicting testimony, and where facts are such that contradictory inferences can reasonably be drawn from them, reviewing court will not substitute other inferences for those adopted by trial court, notwithstanding that reviewing court might have reached different conclusion.

6. Evidence ⇐588

Testimony which is inherently improbable may be disregarded, but to warrant such action, there must exist either physical impossibility of evidence being true or its falsity must be apparent without any resort to inferences or deductions.

7. Parent and child ⇐3(3)

Statute authorizing action for enforcement of parent's duty of support and education and kindred statutes are part of substantive law of state, establishing legal duty of parents accruing to children who are proper parties to action to enforce right and compel performance of duty (Civ.Code, § 203).

8. Parent and child ⇐3(3)

Court having jurisdiction to enforce duty of father to provide support and education in action by minor son had power to make all orders necessary for that purpose including order for counsel fees (Civ.Code, § 203).

9. Parent and child ⇐3(3)

$450 *held* not excessive as award of counsel fees in minor son's action for emancipation and to enforce father's duty to provide support and education where there was sufficient evidence to sustain finding of father's financial ability to comply with order (Civ. Code, § 203).

10. Appeal and error ⇐436

Application for leave to take additional evidence, referring to order in trial court subsequent to rendition of judgment which was before Court of Appeal, and from which order appeal had been taken to Supreme Court *held* required to be denied by Court of Appeal without prejudice to renewal in Supreme Court.

11. Appeal and error ⇐1176(4)

Judgment requiring father to furnish support to minor son, who attained majority during pendency of appeal, and to send son to college would be reversed because of error in requiring father to send son to college, and cause remanded with directions to render judgment for total amount of expenditures reasonably and necessarily made by or through guardian ad litem for maintenance and support of minor son from commencement of action until he attained majority, as established by stipulation or by evidence taken by court (Civ.Code, § 203).

Appeal from Superior Court, Los Angeles County; Arthur Coats, Judge.

Action by Irving Boens, also known as Irving Bennett, a minor, by Bernard D. Rowe, his guardian ad litem, against Harry Bennett, also known as Harry Boens. Judgment for plaintiff, and defendant appeals.

Reversed and remanded, with directions.

Harry G. Sadicoff, of Los Angeles, for appellant.

Louis B. Stanton, of Los Angeles, and Sherman Grancell, of Hollywood, for respondent.

WHITE, Justice pro tem.

This is an action by a minor son of the age of 19½ years to compel his father to support him during his minority and to pay him sufficient money so that the son might attend college. The action was filed January 22, 1935, and the son attained his majority June 11, 1936. After a trial before the court, sitting without a jury, judgment was awarded the son against his father, directing the latter to pay the sum of $150 per month during the minority of the son. The judgment further directed that the payments of $150 per month be made to a guardian ad litem appointed by the court and designated in the judgment, until such time as a general guardian was appointed. The judgment further ordered the father to pay the sum of $450 as counsel fees, and decreed that the son be freed from the dominion and control of his father.

[1] Appellant's first ground of attack upon the judgment is based on the contention that because in 1931 the father obtained a final decree of divorce in the courts of this state and county, which decree awarded the custody of the minor children, including the plaintiff son herein, to the father, and the decree remaining unmodified, that the son, if he has any remedy against his father for support and education, must assert and establish his claim in the divorce case and not by a separate action. The record indicates that in 1918 or 1919 the defendant and his wife, parents of the minor plaintiff herein, separated, the wife and children, including the plaintiff, remaining in New York. In October, 1929, the defendant father filed an action for divorce in the courts of this state at Los Angeles. The entire file in the divorce action was introduced into evidence in the instant case. It showed that service of summons upon the wife residing in New York was made by publication. The evidence shows that the minor plaintiff herein was a resident of New York, where he was born and where he was residing at all times mentioned in the divorce action, and where he continued to reside until June, 1933, when, on the invitation of his father, the son came to California. The trial court held that jurisdiction in the divorce action rested upon substituted service, accomplished by mailing and publication, as a result of which the court found that the California court in the divorce action was without jurisdiction to deal with the custody of the minor children. In this we think the trial court was correct. Where, as in the divorce case here involved, the defendant wife, residing without the territorial jurisdiction of the California courts, served by publication, did not appear, it cannot properly be said that there was a defend-

ant in court. In this proceeding, the court had before it only the status of the plaintiff husband. The summons, when served by publication upon the wife, a nonresident, was not really a writ to bring the defendant wife into court, but merely a notice prescribed by statute in the interests of fairness, and to rebut the idea that the proceeding was secret. 2 Bishop on Marriage and Divorce, § 159. It brought the res into court and not the defendant. The adjudication must be confined to that status. As Judge Cooley, in his Constitutional Limitations (7th Ed., p. 584), says: "The publication which is permitted by the statute is sufficient to justify a decree in these cases changing the status of the complaining party, and thereby terminating the marriage; and it might be sufficient also to empower the court to pass upon the question of the custody and control of the children of the marriage, *if they were then within its jurisdiction. But a decree on this subject would only be absolutely binding on the parties while the children remained within the jurisdiction;* if they acquire a domicile in another state or country, the judicial tribunals of that state or country would have authority to determine the question of their guardianship there." (Italics added.)

If the children are within the jurisdiction, and the defendant is personally served with summons, and perhaps if he is not, the court may award the custody of the children to one of the parents. De la Montanya v. De la Montanya, 112 Cal. 101, 116, 44 P. 345, 32 L.R.A. 82, 53 Am. St.Rep. 165. Where the children are domiciled, as was the case in the divorce action under consideration here, outside the jurisdiction of the California courts, the remedy of the plaintiff husband must, generally speaking in such cases, be confined to a dissolution of the marriage, with the incident benefits springing therefrom, but he cannot legally obtain an order for the custody of the children domiciled without the state. De la Montanya v. De la Montanya, supra, 112 Cal. 101, at page 117, 44 P. 345, 32 L.R.A. 82, 53 Am.St. Rep. 165. See, also, Freeman on Judgments, §§ 584, 585; Brown on Jurisdiction, §§ 6, 8, 78, 79. The trial court was therefore correct in its finding that under the default judgment of divorce obtained by the defendant in an action in which the custody of the children was not mentioned in the complaint, and where the children resided outside the state of California, the California court never acquired or possessed jurisdiction to make or enter any order concerning the custody of the minor children.

There was, therefore, no stricture upon the right of the minor plaintiff herein to bring an action as he did against his father under the provisions of section 203 of the Civil Code, which provides as follows: "The abuse of parental authority is the subject of judicial cognizance in a civil action brought by the child, or by its relative within the third degree, or by the supervisors of the county where the child resides; and when the abuse is established, the child may be freed from the dominion of the parent, and the duty of support and education enforced."

[2] The complaint in this action not only prays for support and maintenance for the minor plaintiff, but demands that the father be required to provide sufficient money with which to furnish the minor plaintiff with a college education, as well as sufficient money with which the plaintiff could "procure an adequate supply of clothing and other furnishings, as well as adequate transportation facilities to and from college and in and about college and for the payment of college expenses, tuition, and books"; and the court found that the defendant father's refusal to furnish the son with funds to attend college was "on account of selfish reasons pertaining to defendant alone and without any regard whatsoever for the welfare of said Irving Boens"; while the judgment predicated in part thereon required of the defendant father that he pay to the minor son $150 per month, not only for support and maintenance, but to finance his son in a college career.

Our attention is not directed to any law or decision in this state requiring a father to send his boy to college. In this connection, research upon our part has been rewarded only with the provisions of the School Code of the state of California, where section 1.130 et seq. impose upon parents, guardians, or other persons having control of any child between the ages of 8 and 16 years the duty to send such child to a full-time school, subject to certain exceptions in said sections stated; and the minor son herein was more than 19 years of age. The alien philosophy that the child is the creature of the state finds no countenance in the American

system of government; and when a child has reached the age of 16 years the courts are not authorized to substitute their judgment for that of the parent as to whether the best interests of the child are served by sending him to college, teaching him a trade, or preparing him for a business career in a practical way. It is not only the privilege but the duty of the parents to supervise the intellectual as well as the moral development of their children. The father is under no legal duty, after his son has attained the age of 16 years, to send the latter to college, no matter what the father's financial circumstances may be. True, many a father does it, at a sacrifice to himself and the other members of his family, but he does so voluntarily. No doubt the trial court had such instances in mind, but, after all, if a father sees fit to content himself with a common school and high school education for his son, the law ordinarily will require no more of him. A father, unless his parental authority has been taken away by the courts, is the one to decide the extent of the education of his child beyond what is provided by the school system of the state. Streitwolf v. Streitwolf, 58 N.J.Eq. 570, 43 A. 904, 45 L.R.A. 842. And if the child, as in the instant case, is past the age of 16 years, the father cannot be compelled by law to give the latter a college education. If the father were dead and the minor son had property, his education could be paid for out of his income, under the direction of the probate court, on a basis of what was proper and customary for one in his station in life; but that is not this case. The son's ambition in the direction of a liberal college education is in itself commendable, but upon the facts now before us, the father cannot be forced to gratify that ambition without making an unwise exception to a good rule.

[3-6] We come now to a consideration of the findings of the trial court that the minor son was not in possession of sufficient money from his own earnings with which to support and maintain himself with the common necessities of life, and that during the six months preceding the commencement of this action the minor plaintiff had been dependent in part upon his sister for the necessities of life; and also, the conclusion of law based on the foregoing, that defendant had abused his parental authority and that plaintiff, minor son of defendant, is entitled to have enforced against the latter the duty to provide his minor son with support. It would unduly prolong this opinion to here set forth the evidence in detail. Suffice it to say, there was a sharp conflict in the evidence on these issues. If, however, the trial court believed, as evidently it did, the testimony of the minor plaintiff's sister and other witnesses in his behalf, it was within its rights in rejecting the adverse testimony of the father and witnesses corroborating him. Belief by the trial court of the testimony adduced in behalf of the minor plaintiff entitled the court to make the aforesaid findings and conclusions, because each of them finds substantial support in the evidence. What we have just said applies with equal force to appellant's claim that by reason of the retention by the minor plaintiff of his earnings he was emancipated from his father and that the latter, therefore, was not liable for the minor son's support and maintenance. Upon the triers of fact rests the responsibility to reconcile, if possible, any apparent conflict, whether the same arises from the entire case or in the testimony of a single witness, and to effectuate all the evidence, when the nature of the case will admit of such a disposition; or, if the conflict is irreconcilable, to place their own value on the contradictory evidence. Darling v. Pacific Electric Ry. Co., 197 Cal. 702, 708, 242 P. 703. Conceding that conflicting inferences may be drawn by reasonable minds from the state of facts in this case concerning the issues just stated, the court having adopted the one and rejected the other, its decision is binding upon the appellate court, the case being in substance the same as where the court decides upon the weight of contradictory evidence. Boland v. Gosser, 5 Cal.App.(2d) 700, 43 P.(2d) 559; MacDermot v. Hayes, 175 Cal. 95, 104, 170 P. 616; Haight v. Haight, 151 Cal. 90, 90 P. 197; Paine v. San Bernardino, etc., Co., 143 Cal. 654, 77 P. 659. All intendments are in favor of the findings and judgment arrived at upon conflicting testimony. Where the facts are such that contradictory inferences can reasonably be drawn from them, an appellate court will not substitute other inferences for those adopted by the trial court. Hughes v. Quackenbush, 1 Cal.App.(2d) 349, 354, 37 P.(2d) 99; Ketelhut v. Gunther, 100 Cal.App. 409, 279 P. 1083; Coats v. Hathorn, 121 Cal.App. 257, 8 P.(2d) 1038.

This is the rule even where the reviewing court might have reached a different conclusion. Conness v. McCarty, 216 Cal. 415, 14 P.(2d) 507; Foxe v. Southern Pacific Co., 121 Cal.App. 633, 9 P.(2d) 514; McGlothin v. Larussa, 122 Cal.App. 324, 10 P.(2d) 116. Of course, testimony which is inherently improbable may be disregarded (Neilson v. Houle, 200 Cal. 726, 254 P. 891), but to warrant such action there must exist either a physical impossibility of the evidence being true, or its falsity must be apparent, without any resort to inferences or deductions (Powell v. Powell, 40 Cal.App. 155, 180 P. 346; Stahmer v. Stahmer, 125 Cal.App. 132, 13 P.(2d) 833).

The obligation, both moral and legal, rested upon this defendant father, who brought his minor son from New York to California, to give the latter support suitable to the former's circumstances, and if the court believed, as it had a right to believe, from the evidence, that the father repudiated this obligation and by his conduct cast his son and the responsibility for the latter's maintenance upon others, then it was proper for the court to make an award to a guardian of such sum as was necessary to support the minor child according to the circumstances of the father.

[7-9] Appellant's final claim is that the trial court was without power to award attorney's fees to counsel for the minor plaintiff. This contention of appellant is without merit. Section 203 and kindred sections of the Civil Code are part of the substantive law of the state, establishing and declaring a legal duty of the parent to maintain and support his children who are within such provisions, and establishing the right in such children to have such maintenance and support and to enforce against the parent such obligation and duty upon the latter's part. As the duty runs to the children, the latter are the persons to whom the right imposed by the duty accrues; and they are the proper parties to an action to enforce such right and compel the performance of such duty. The court having, as we have seen, jurisdiction to enforce the provisions of section 203 of the Civil Code, it had the power to make all orders necessary for that purpose, including the order for counsel fees. There was sufficient evidence to sustain the finding of appellant's financial ability to comply with such order, and there was no abuse of discretion in the amount awarded.

[10] Appellant also filed herein an application for leave to take additional evidence of facts occurring subsequent to the entry of judgment. An examination of the record indicates that this application has reference to an order made in the court below subsequent to the rendition of the judgment now before us on appeal, and that from such order made after final judgment an appeal has been taken by appellant to the Supreme Court, bearing the latter tribunal's number L. A. 15446. The application in question, therefore, should have been addressed to the Supreme Court in the above-numbered case. So far as the case before us is concerned, the application for leave to take additional evidence is therefore denied, without prejudice to its renewal in the Supreme Court in the case referred to in the matters presented by such application.

Other points raised on this appeal do not require discussion.

[11] In view of what we have said herein, it becomes necessary to reverse the judgment appealed from, but a new trial is not necessary. Holding as we do, that the trial court was in error under the facts of this case in ordering that the father send his son to college, and due to the further fact that the minor respondent here involved attained his majority on June 11, 1936, since which time the appellant father was not required to maintain and support his son because of the latter's minority alone, the trial court in its findings should therefore render judgment for the total amount of such expenditures as were reasonably and necessarily made by or through the guardian ad litem appointed by the court for the maintenance and support of said minor son from the commencement of this action until he attained his majority on June 11, 1934.

Unless the parties stipulate as to the amount of such expenditures, then the trial court should take evidence as to the amount so necessarily expended for such support and maintenance from the date of the commencement of this action up to June 11, 1936, on which latter date the minor respondent became of age.

For the foregoing reasons, the judgment is reversed and the cause remanded,

with directions to the court below to enter judgment in accordance with the views herein expressed.

We concur: YORK, Acting P. J.; DORAN, J.



20 Cal.App.2d 618

SECURITY-FIRST NAT. BANK OF LOS ANGELES v. SPRING ST. PROPERTIES, Inc., et al.

Civ. S. C. 2.

District Court of Appeal, Second District, Division 1, California.

April 30, 1937.

Hearing Denied by Supreme Court June 28, 1937.

1. Pledges ⇐18

Where sublease and chattel mortgage securing sublease were pledged under trust indenture giving trustee power of foreclosure, and assignment of rents was executed, as part of same transaction, providing that "this instrument" should not operate as transfer of sublease, such provision referred to assignment, and was not intended to modify trust indenture, as respects validity of sale made under chattel mortgage by pledgor's assignee without concurrence of trustee.

2. Estoppel ⇐95

Where sublease and chattel mortgage securing sublease were pledged under trust indenture giving trustee power of foreclosure, trustee's failure to reply to letters giving notice of intention of pledgor's assignee to cancel sublease and to sell mortgaged property, and stating that such assignee would assume that trustee concurred in such intended acts in absence of reply, *held* not to estop trustee from disputing validity of sale made without its concurrence.

3. Estoppel ⇐118

Where sublease and chattel mortgage securing sublease were pledged under trust indenture giving trustee power of foreclosure, pledgor's assignee proposed to cancel sublease and to sell mortgaged property, and trustee denied that assignee had such right without trustee's concurrence, evidence that trustee's officer made statement indicating assent to such acts *held* insufficient to raise estoppel of trustee to dispute validity of sale made without its concurrence, as failing to show reliance upon officer's statement (Code Civ.Proc. § 1962, subd. 3).

4. Pledges ⇐30(2)

When owner of securities pledges them to secure payment of his own debt, he impliedly transfers right to remedies which will make securities available for payment of debt in case of his own default, and pledgee has control of property for time being and represents not only his own interest, but that of pledgor, in taking any proper action for preservation of property and collection and care of its proceeds.

5. Pledges ⇐30(1)

Where sublease of hotel property and chattel mortgage of furnishings securing sublease were pledged under trust indenture giving trustee power of foreclosure, sale of furnishings by pledgor's assignee on mortgagors' default, made without concurrence of trustee, *held* void, notwithstanding that assignee was not in default under terms of trust indenture, and notwithstanding possibility that assignee might be left without a "remedy."

6. Pledges ⇐30(1)

Where sublease and chattel mortgage securing sublease were pledged under trust indenture giving trustee power of foreclosure, as respects right of pledgor's assignee to sell property mortgaged on default of mortgagors without concurrence of trustee, assignee could not claim right of sale to escape liability for conversion for failure to sell property within reasonable time after having taken possession, since rule requiring such a sale applies only to unqualified pledges.

Appeal from Superior Court, Los Angeles County; Isaac Pacht, Judge.

Action by the Security-First National Bank of Los Angeles, a national banking association, against Spring Street Properties, Inc., a Delaware corporation, and another. From an adverse judgment, plaintiff appeals.

Reversed.

Gibson, Dunn & Crutcher, of Los Angeles (Keith Bullitt and Frederic H. Sturdy, both of Los Angeles, of counsel), for appellant.

E. O. Leake and J. J. Leake, both of Los Angeles, for respondents.

DORAN, Justice.

This is an appeal from a judgment in favor of respondent Federated Realty Company, Limited, in an action for declaratory relief wherein it was sought to have it ad-

judged that the defendants had no title to certain furniture and furnishings in the Alexandria Hotel, or that any title they, or either of them, held was subject and subordinate to the lien held by plaintiff, and to have the rights of the parties in and to said furniture and furnishings declared.

The facts, as shown in substance, express or implied, by the findings of the trial court, are, briefly, as follows: During May, 1927, Alexandria Hotel Realty Corporation, a corporation, was the owner of seven ground leases upon which was constructed the Alexandria Hotel, then operated as a hotel. At that time the Alexandria Hotel Realty Corporation leased the premises to E. C. Eppley and Charles B. Hamilton, and at the same time sold and transferred the furniture, furnishings, and equipment of said hotel to said Eppley and Hamilton, taking back a chattel mortgage on said furniture, furnishings, and equipment to secure the obligation of said sublease. The Alexandria Hotel Realty Corporation then issued bonds and, to secure the same, executed to the Security Trust & Savings Bank, appellant's predecessor in interest, as trustee, a trust indenture. By this trust indenture the Alexandria Hotel Realty Corporation pledged and hypothecated to said bank, as trustee, the seven ground leases above mentioned and also the sublease to E. C. Eppley and Charles B. Hamilton, as well as the chattel mortgage above mentioned.

Section 10 of article IV of the trust indenture provided as follows: "The Company (Alexandria Hotel Realty Corporation) covenants and agrees that it will at any time, upon request of the Trustee, make, do, execute, acknowledge and deliver all such further and other acts, deeds and things as shall be reasonably required to effectuate the intention of these presents and to assure and to confirm to the Trustee or its successors all and singular the property hereinbefore described, and hereby intended to be granted, so as to render the same, and especially such portions thereof as shall be hereafter acquired by the Company or its successors, available for the security and satisfaction of the bonds secured hereby, according to the intent and purpose herein expressed."

Section 4 of article IV of the trust indenture provided in part as follows: "The Company covenants and agrees that this indenture now is and always will be kept a first lien (Excepting taxes or assessments due but not delinquent) upon all the property described or mentioned in the granting clauses hereof; that it will not voluntarily create or suffer to be created or to arise any lien or charge of priority to or preference over the lien of these presents upon the trust estate, or any part thereof, or upon the income thereof."

The trust indenture further provided, by section 26 of article IV, that "Any chattel mortgage, or other mortgage, given for the security of the performance of the Hotel Lease, or of any lease or sublease hereafter made, of any part of the premises herein demised, shall be deposited with the Trustee as additional security hereunder, and the Trustee is hereby empowered as the attorney in fact of the Company hereby irrevocably appointed for that purpose, to take all steps necessary to maintain said security in full force, and to foreclose said security in the event that a default should occur under the terms of said Hotel lease or of any sublease, but nothing herein shall be construed as requiring any affirmative action on the part of the Trustee with respect to the enforcement of any chattel mortgage or other lien or security deposited with it under the foregoing provisions, unless it is requested by twenty-five per cent (25%) in amount of the holders of bonds secured hereby."

Concurrently with the execution of the aforesaid instruments, and as a part of the same transaction, said Alexandria Hotel Realty Corporation, at the request of the trustee, executed and delivered to said trustee an assignment of rents, which assignment provided, in part, as follows: "Whereas under an Indenture made as of the 1st day of May, 1927, between the undersigned, Alexandria Hotel Realty Corporation and Security Trust & Savings Bank" (given to secure bonds, etc.) "it is provided that all rentals collected and/or payable to the undersigned, Alexandria Hotel Realty Corporation, under the terms of said Sublease *shall be deposited with said Security Trust & Savings Bank, Trustee, under said Indenture aforesaid, upon the trusts and for the uses and purposes therein set forth.*

"Now Therefore for value received, the undersigned, Alexandria Hotel Realty Corporation, hereby sells, assigns, transfers and sets over unto said Security Trust & Savings Bank, Trustee, as aforesaid, all rents, issues and profits to which it, as said Sublessor is or may hereinafter become entitled under and in accordance with the terms of said Sublease.

"*This instrument is not intended to be and shall not operate as a transfer of said Sublease itself other than the rents, issues and profits to be derived therefrom,* and the undersigned Alexandria Hotel Realty Corporation, the Sublessor shall continue to be liable and to perform and does hereby with said Assignee undertake and agree faithfully to perform each and all the covenants, undertakings and agreements assumed by it under the terms of said Sublease.

"The said Security Trust & Savings Bank is hereby constituted and appointed the true and lawful attorney of the undersigned Alexandria Hotel Realty Corporation, in its name, place and stead, to ask, demand, sue for, collect and receive, as such Trustee, each and all of said rents, issues and profits as they respectively become due and payable." (Italics added.)

Thereafter, Hamilton and Eppley assigned their interest in the above-mentioned sublease to the Alexandria Hotel Company (a different corporation and not to be confused with Alexandria Hotel Realty Corporation), which company thereafter operated the hotel. The interest of the mortgagor, to wit, the Alexandria Hotel Realty Corporation, was sold to Spring Street Properties, Inc., under an express acceptance by the purchaser of the terms, covenants and conditions of the trust indenture and pursuant to an agreement by the purchaser to perform all of the covenants and conditions imposed thereby on the mortgagor.

On September 29, 1932, at which time it is conceded that the Alexandria Hotel Company, the sublessee, was hopelessly insolvent, Spring Street Properties, Inc., canceled the lease, took possession of the hotel, and thereafter conducted and managed the operation thereof. Theretofore, however, to wit, on May 31, 1932, Spring Street Properties, Inc., had informed the trustee under the trust indenture that the sublessee was in default and of the likely necessity of the cancellation by Spring Street Properties, Inc., of the lease. The trustee bank replied in a letter dated June 17, 1932, in substance, that the sublease could not be canceled without the concurrence of the bank, as trustee under the trust indenture. Thereafter, to wit, on October 13, 1932, Spring Street Properties, Inc., in compliance with the law respecting the sale of mortgaged chattels, sold the property at public auction. No demand had theretofore been made on the trustee to foreclose the chattel mortgage either by sale or court action. Incidentally, no notice of the time and place of the sale was given to the trustee and in that connection there is evidence in the record that Spring Street Properties, Inc., did not desire the bank to know of the sale. The Federated Realty Company, which owned 40 per cent. of the stock of Spring Street Properties, Inc., was the only bidder at the sale. The purchase price was not for cash but was paid by canceling a pre-existing debt from Spring Street Properties, Inc., to Federated Realty Company.

It should be noted here that although the Alexandria Hotel Company had defaulted in its payment of the rents due under the sublease, nevertheless Spring Street Properties, Inc., had paid to the trustee the amount of the rentals reserved by the sublease so that there was, at the time of the cancellation thereof, no default on the part of Spring Street Properties, Inc., so far as its obligation under the trust indenture was concerned.

As hereinbefore stated, the foregoing recitation of facts is shown by the findings, in addition to which the court found specifically that Alexandria Hotel Realty Corporation pledged the sublease and chattel mortgage; that plaintiff was, prior to September 29, 1932, the pledgee of the lessor's rights under said sublease; that the rights of plaintiff as such pledgee were expressed in the trust indenture and not otherwise; that upon and after September 29, 1932, upon the cancellation and termination on that day of said sublease said chattel mortgage stood and remained as security only for the payment of rentals which had accrued prior to September 29, 1932; that Spring Street Properties, Inc., had paid plaintiff the full amount of rentals which had accrued under said sublease prior to September 29, 1932; that said chattel mortgage by its terms was given for the purpose of securing payment of the rent reserved in said sublease and for the prompt performance of the covenants of said sublease; that on the 30th day of September, 1932, Spring Street Properties, Inc., paid to plaintiff the sum of $15,416.67, being the entire balance due to and including said date of cancellation; that Spring Street Properties, Inc., notified plaintiff on said date that said lease had been canceled and that Spring Street Properties, Inc., had taken over and was in possession of the premises and that therefore there would be no further rental payments due under the sublease but that its

(Spring Street Properties, Inc.) own obligations under the trust indenture would be discharged; that thereafter and until March, 1933, Spring Street Properties, Inc., paid all moneys due to plaintiff under said trust indenture; that plaintiff had acquiesced in and consented to the termination of the sublease.

As a conclusion of law, the trial court found that plaintiff had no lien upon the chattels described or referred to in the chattel mortgage; that at the time of the sale, to wit, on October 17, 1932, of the personal property covered by the chattel mortgage, there was no default under the terms of the trust indenture, and neither Spring Street Properties, Inc., nor Alexandria Hotel Company was under any obligation to pay plaintiff any moneys whatever; that the sale of the chattels was valid and that Federated Realty Company, Limited, became the owner of the property covered by said chattel mortgage; and that plaintiff had no right, title, or interest therein nor lien thereon. The trial court further concluded as a matter of law that plaintiff was estopped to deny that the sublease was canceled and terminated, and was estopped to deny the right of Spring Street Properties, Inc., to sell the personal property described and referred to in the chattel mortgage, and was therefore estopped to deny that Federated Realty Company, Limited, was the owner of said personal property, as well as estopped to assert any right, title, or interest therein or any lien thereon.

It is appellant's contention: First, that a pledgor of a lease, chattel, mortgage or other chose in action cannot, without the consent of the pledgee, cancel such lease or foreclose such mortgage or exercise any other right or remedy given the pledgor by the pledged instrument; second, that under the provisions of the trust indenture and the unconditional acceptance thereof by Spring Street Properties, Inc., it was estopped to assert any rights so to do or to attempt to cancel the sublease or by any act or means take out from under the lien of the trust indenture the hotel lease or the lien of the chattel mortgage upon the furniture; third, that Federated Realty Company, Limited, owning 40 per cent. of the stock of Spring Street Properties, Inc., and having the same officers and attorneys as Spring Street Properties was charged with knowledge of the entire situation, and could not obtain title to the furniture and furnishings free and clear of the lien of the chattel mortgage held by the trustee; fourth, that even if the trustee could legally be estopped to assert its right as trustee to any portion of the trust estate, the record is destitute of any act or conduct on the part of the trustee which constitutes such estoppel; and, fifth, that plaintiff, as trustee of an express trust, was incapable legally of consenting to the abstraction from the trust estate of any part of its corpus, or of being estopped to enforce any of the rights given it for the benefit of the bondholders, and especially could not be estopped to enforce such rights as against defendants in this case who dealt with it with full knowledge that it was a trustee and that the hotel lease and chattel mortgage had been pledged with it, not for its own use or benefit, but for the benefit and protection of the bondholders.

It is respondents' contention, on the other hand, that notice of all actions taken by Spring Street Properties, Inc., was given to the trustee and that they were acquiesced in by the trustee, and that Spring Street Properties, Inc., was the only one who had the right to enforce the provisions of the sublease or to terminate same for a violation of the provisions thereof.

It is further contended by respondents that Alexandria Hotel Realty Corporation did not make an absolute assignment of the sublease to the trustee; that the provision in the instrument assigning rents, to wit, "This instrument is not intended to be and shall not operate as a transfer of said Sublease itself other than the rents, issues and profits to be derived therefrom" was a modification of the trust indenture to the extent that no outright assignment of the lessor's interest under the sublease was made or intended to be made.

[1] Respondents' contention last mentioned is untenable, first, because the court expressly found to the contrary; and, second, construing the assignment in the light of the terms of the trust indenture, the clause in question, namely, "This instrument is not intended to be and shall not operate as a transfer of said sublease" is obviously but an attempt to make clear what otherwise might be ambiguous, and merely emphasizes the exclusive purpose of the instrument. By the terms of the trust indenture the sublease had already been pledged with the trustee and in no sense could the trust indenture be held to have been modified or limited by the above-quoted portion of the instrument purporting to assign only the rents.

[2] Likewise is respondents' contention untenable that "notice" bears any relevancy to the controversy. In this connection Spring Street Properties, Inc., several times notified plaintiff of its intention to cancel the lease, to which plaintiff replied, in one communication, under date of June 17, 1932, as follows: "After carefully considering the various documents relating to this transaction we have concluded that this sublease may not be cancelled without the concurrence of this Bank as the Trustee under the Trust Indenture of the Alexandria Hotel Realty Corporation." Thereafter, on June 22d, Spring Street Properties, Inc., in a letter to plaintiff reasserted its right to cancel the sublease, accompanied by the warning that any interference by the trustee would be regarded as an invasion of the rights of Spring Street Properties, Inc., for which the trustee would be held responsible. The letter concluded with the paragraph: "We are giving you this notice pursuant to your request therefor, and if we do not receive your immediate reply, will assume that you concur in our interpretation of our rights in the premises." To this letter plaintiff made no reply. Such a notice, or any notice, to the trustee of an intention to cancel the sublease manifestly could not alter the terms of the trust indenture, which trust indenture definitely determined the rights of the bondholders, as well as the authority and duty of the trustee; moreover, the same trust indenture fixed the rights and authority of Spring Street Properties, Inc., in the premises. The failure to reply to such a letter pursuant to the terms thereof or to the threat therein contained, or at all, is of no evidentiary value. Such failure binds the addressee to no course whatever, nor does it operate as an estoppel. Silence, under such circumstances, is never the equivalent of consent; such a doctrine would place the whole world at the mercy of letter writers.

[3] Respondents' claim that plaintiff had acquiesced in and consented to the termination of the sublease was sustained by the trial court. With respect to this question, however, there appears to be a conflict in the testimony. On the one hand there is the undisputed fact that the trustee had written to Spring Street Properties, Inc., in substance that the sublease could not be canceled without the concurrence of the trustee. On the other hand there was testimony by two witnesses, one Mr. Gause and a Mr. Leake, on behalf of respondents, that Mr. Nossaman, trust officer for the bank, had declared in their presence and in the presence of a Mr. Hogan, with respect to the cancellation of the lease, "Well, the way matters have gone up to the present it looks like the only thing to do and to go ahead and do it." (Both Mr. Hogan and Mr. Nossaman denied that such statement was made by Mr. Nossaman.) The testimony just quoted appears to be the only evidence in the record to support respondents' claim as well as the court's finding that plaintiff had consented to the cancellation of the lease. It was in this connection that the trial court concluded as a matter of law that the trustee was estopped to deny that the sublease was canceled and terminated, as hereinbefore more particularly set forth. Although at most it appears to be but an expression of opinion, whether the above testimony in regard to the alleged statement of Mr. Nossaman was the equivalent of consent is relatively unimportant, for, under no circumstances in the light of the record, could it have the legal effect of an estoppel, and in that same regard, therefore, the court's conclusion that an estoppel occurred is totally unsupported by the evidence. Spring Street Properties, Inc., had repeatedly theretofore declared its intention to cancel the lease, and there is nothing in the record to even suggest that it had acted upon the alleged statement of Mr. Nossaman. Obviously such a situation lacks the essential elements of estoppel. Subdivision 3, § 1962, Code Civ.Proc.; Biddle Boggs v. Merced Mining Co., 14 Cal. 279, 368; City of San Diego v. Cuyamaca Water Co., 209 Cal. 105, 149, 287 P. 475; Hammond Lumber Co. v. Weeks, 105 Cal. App. 315, 319, 287 P. 573.

Referring again, but with more particularity, to the cancellation of the sublease and the sale of the property secured thereby, in addition to section 4 of article IV of the trust indenture, above quoted, said trust indenture further provided, in section 3 thereof, as follows: "The Company (Alexandria Hotel Realty Corporation) covenants and agrees that all business in connection with the trust estate will be continuously carried on and conducted in an efficient manner, and that the trust estate will be cared for, maintained, preserved and kept in thorough repair, working order and condition, so that at no time shall the efficiency thereof be or become impaired." Section 3, just quoted, is significant, for it should be

noted that the furnishings of the hotel were not a part of the trust estate. Manifestly, the business in connection with the trust estate could not be continuously carried on and conducted in an efficient manner, and the trust estate cared for, maintained, preserved, and kept in thorough repair, working order, and condition unless the hotel was adequately furnished and a going concern. A failure to preserve such condition would materially impair the trust estate. Whether the mortgagor, therefore, could cancel the sublease, foreclose the chattel mortgage and sell out the furnishings of the hotel under the foreclosure, was of vital importance to the trustee and the bondholders whom such trustee represented. And it was the pledge of the sublease and the chattel mortgage with the trustee, as a part of the security for the bonds, that gave to the trustee the control of the hotel furnishings as such security, without which the total securities constituting the corpus of the trust would have been encumbered with a perpetual hazard.

[4, 5] By the pledge with the trustee of the sublease and the chattel mortgage, the risk in this regard was reduced to a minimum, a condition upon which the bondholders had a right to rely, for it is the law that "When the owner of securities pledges them to secure the payment of his own debt, he impliedly transfers the right to the remedies which will make the securities available for the payment of his debt in case of his own default. The pledgee of property has the control of it for the time being, and he represents not only his own interest, but that of the pledgor, in taking any proper action for the preservation of it and the collection and care of its proceeds." 21 R.C.L. 666, § 29. Spring Street Properties, Inc., was without right, therefore, to foreclose the chattel mortgage and to attempt thereby to enforce the pledged security. Such right was exclusively in the pledgee. Works v. Merritt, 105 Cal. 467, 38 P. 1109; Puckhaber v. Henry, 152 Cal. 419, 425, 93 P. 114, 125 Am.St.Rep. 75, 14 Ann.Cas. 844; Gilman v. Curtis, 66 Cal. 116, 117, 4 P. 1094; Bridge v. Connecticut Mutual Life Ins. Co., 167 Cal. 774, 777, 141 P. 375.

It is no defense to the action of Spring Street Properties, Inc., that the chattel mortgage was given only to secure the rents due under the sublease and that at the time of the cancellation of the sublease there was no default on the part of Spring Street Properties, Inc., so far as concerned its obligations under the trust indenture. The fact remains, and it clearly is decisive of the controversy herein, that the sublease and chattel mortgage were *pledged* at the time Spring Street Properties, Inc., conducted the foreclosure sale.

Nor is it any defense that Spring Street Properties, Inc., would have been left without a "remedy." If such was the fact, it was because the "remedy" was relinquished when the sublease and chattel mortgage were pledged. Under the circumstances, the course to pursue was for the trustee to determine, who, as agent for the bondholders, and by virtue of the terms of the trust indenture, was, unless requested by the bondholders as the indenture provided, impliedly vested with the power to determine questions likely to arise in the administration of the trust estate. In this regard, so far as the interest of the bondholders was concerned, the advisability of canceling the lease, and thereafter the advisability of foreclosing the chattel mortgage, manifestly presented two questions entirely different in the effect of each on the value of the bonds. The lease might have been canceled without necessarily jeopardizing the trust, whereas the foreclosure of the chattel mortgage and the removal of the hotel furnishings might, and indeed did, as the record herein appears to indicate, virtually complete the destruction of the trust estate. Such problems were of vital concern to the trustee. Whether the result would have been any different, if the right to foreclose or otherwise enforce the pledged security had remained in the trustee undisturbed, is beside the issue. The assumption of those rights by the pledgor was without legal sanction, and the sale under the attempted foreclosure was, therefore, void.

[6] Respondents point out that having taken possession of the chattels described in the mortgage, Spring Street Properties, Inc., would have been responsible for conversion for failure to sell the chattels within a reasonable time, citing in support of such rule, Peet v. People's Trust, etc., Bank, 56 Cal.App. 46, 204 P. 413; Peet v. People's Trust & Savings Bank, 90 Cal.App. 436, 266 P. 300; and Blodgett v. Rheinschild, 56 Cal.App. 728, 206 P. 674. Assuming the rule to be as stated, it is not applicable to the case at bar, for such rule obviously applies to unqualified pledges. The authorities cited do not hold that the parties to a chattel

mortgage agreement are precluded altogether from fixing the terms and conditions thereof.

For the foregoing reasons, the judgment appealed from is reversed.

We concur: HOUSER, P. J.; YORK, J.



20 Cal.App.2d 602

McLAUGHLIN v. SECURITY-FIRST NAT. BANK OF LOS ANGELES.

Civ. S. C. 45.

District Court of Appeal, Second District, Division 1, California.

April 30, 1937.

1. Trusts ⇐331

Decree of probate court approving testamentary trustee's report of activities, being conclusive on all parties under statute, precludes probate court from relieving beneficiary from consequences thereof (Probate Code, §§ 1120, 1123).

2. Appeal and error ⇐917(1)

Where complaint attacking approval of probate report does not allege that due notice of hearing on probate report was not given, appellate court must presume on review of judgment sustaining demurrer to complaint, that due notice was given.

3. Judgment ⇐443(1)

Equity will relieve against a judgment only if judgment was obtained through extrinsic fraud.

4. Judgment ⇐511

"Extrinsic fraud" such as will render judgment subject to collateral attack is fraud which, rather than going to merits of judgment, has prevented cause from being fully considered on its merits, as by preventing party from attending hearing or from presenting his case fully.

[Ed. Note.—For other definitions of "Extrinsic or Collateral Fraud," see Words & Phrases.]

5. Judgment ⇐511

That testamentary trustee's report included allegedly false statement, that description of assets therein was limited, that before alleged loss trustee told beneficiary that trust would be paid in full, and that notice of hearing on such report stated that beneficiary was not required to attend, *held* not to establish such extrinsic fraud as would authorize collateral attack on decree approving such report so as to render trustee liable for allegedly improper investment (Probate Code, §§ 1120, 1123; St.1925, p. 526, § 104).

6. Appeal and error ⇐840(1)

On appeal from judgment upholding probate decree which approved investment of funds by trust department of bank as trustee in allegedly worthless participation certificate by bank, contention that certificates were void *held* not reviewable where certificate apparently complied with statute, since only extrinsic fraud in probate decree could be considered (Probate Code, §§ 1120, 1123; St.1925, p. 526, § 104).

7. Trusts ⇐333

In action by beneficiary of testamentary trust attacking decree approving trustee's report, allegation that letter sent with formal notice of hearing on report, advising beneficiary that he was not required to attend hearing, induced beneficiary not to attend, *held* insufficient to rebut presumption that notices were given as required by law (Probate Code, §§ 1120, 1123).

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by William Neil McLaughlin against Security-First National Bank of Los Angeles, individually and as trustee. From a judgment dismissing the complaint after demurrer thereto was sustained, plaintiff appeals.

Affirmed.

John W. Carrigan and J. Vincent Hannon, both of Los Angeles, for appellant.

Newlin & Ashburn, of Los Angeles (C. Hudson B. Cox and A. W. Ashburn, both of Los Angeles, of counsel), for respondent.

PER CURIAM.

Plaintiff's complaint having been tested by demurrer and found lacking, the demurrer was sustained without leave to amend and a judgment of dismissal entered. It is from this judgment that the plaintiff has appealed. We are of the opinion that the

determination of the trial court was correct; the complaint does not state facts sufficient to constitute a cause of action.

From the complaint we find that, plaintiff's grandmother having provided in her will that $3,000 should be left in trust for him until he attained the age of thirty, that sum was in 1925 distributed to the defendant's predecessor in responsibility, Security Trust & Savings Bank, as trustee for the plaintiff. The trustee, Security Trust & Savings Bank, was succeeded by the defendant during the life of the trust; we need not distinguish between them. The trustee in its operation as a bank had a number of notes secured by trust deeds or mortgages against which it issued participating certificates. In these participating certificates the bank, as trustee in many trusts, invested the funds it held, and in this manner it invested the $3,000 it held in trust for the plaintiff. The fault the plaintiff finds with the purchase of the certificates, referred to in the first and second reports and accounts rendered by the trustee, is that the certificates were void because they were securities issued without a permit from the commissioner of corporations. This same objection is made to the certificate referred to in the third and fourth account and further objection is made that the security back of this certificate was woefully inadequate, the market value of the land being less than 10 per cent. of the mortgage and the makers of the mortgage being insolvent.

Four reports and accounts of the trustee to the court are mentioned, the fourth being the final account rendered after the plaintiff attained the age of thirty. The complaint is silent as to the dates upon which they were rendered or when they were confirmed and approved. To the extent noted later, these reports referred to the investments that had been made, and, as already noted, the reports were confirmed and approved.

[1, 2] The activities of a trustee are properly reported to the probate court. Section 1120, Probate Code. Its decree approving these activities, when final, is "conclusive upon all persons in interest." Section 1123, Probate Code. The complaint contained no allegations that due notices of the hearings on the accounts had not been given, so we must presume that proper notices were given. Abels v. Frey, 126 Cal. App. 48, 14 P.(2d) 594. In the premises, the decrees confirming the accounts were conclusive on the plaintiff; the probate court could give him no relief whatever. Security-First National Bank v. Superior Court, 1 Cal.(2d) 749, 37 P.(2d) 69.

[3, 4] So it is that plaintiff sought the aid of the superior court, sitting as a court of equity. Its aid, however, may be granted only if the judgment which stands in the plaintiff's way was obtained through extrinsic fraud. Adams v. Martin, 3 Cal.(2d) 246, 44 P.(2d) 572; Ringwalt v. Bank of America Nat. Trust & Sav. Ass'n, 3 Cal. (2d) 680, 45 P.(2d) 967. "Extrinsic fraud" is best defined both negatively and affirmatively. Negatively, it may be said not to be fraud which goes to the merits of the judgment. Affirmatively, it is fraud which has prevented the cause from having been fully considered on its merits. As an illustration, when a party is prevented by fraud from being present at a hearing or, if present, from presenting his case fully, the situation is one where fraud has prevented a cause from having been fully considered on its merits. See cases hereinafter cited.

[5] Tested by this definition, as we find it applied, the complaint does not allege facts showing extrinsic fraud. In part the allegations show fraud which is intrinsic; it went to the merits of the reports. In this respect we note that each report, other than the first, contains this statement: "The details of all its acts and of these transactions and the securities and/or properties in which the trust estate is now invested are as set forth herein. All investments made for said trust are in securities authorized by law or by the terms of said trust, have been carefully selected and made for the purpose of serving the best interests of this trust and all parties interested therein, and on none of them has the trustee made any profit, direct or indirect." This statement was false, the complaint avers, and was known to the trustee to be so, and it was made to bring about the result achieved, the confirmation of the report. To the same end, the complaint points out, the report was silent about the lack of a permit to issue certificates of participating interests, and made no mention of the character or value of the property standing as security back of the certificates.

[6] We are not passing upon the plaintiff's contention that the certificates in which the defendant invested its trust funds are void, for two reasons. In the first place they are seemingly authorized by section 104 of the Bank Act (Stats.1909, p. 87, § 104, as added by St.1925, p. 526. Act 652, Deering's Gen.Laws), and in his opening brief the plaintiff presented neither argument nor

authority in support of his claim that the issuance of such certificates was governed also by the provisions of the Corporate Securities Act. Stats.1917, p. 673, as amended; Act 3814, Deering's Gen.Laws. The more significant reason why we are not passing upon the question is that we do not find it an unanswered one, open to us, on this appeal. In approving the acts of the trustee in making the investments it had reported, the probate court necessarily had open before it the question of the legality of the investments and the matter of their economic merit as well. The approval of these investments, requested by the trustee, presented for determination at least these two issues. The false representations and lack of complete revealment on these issues, therefore, went to the merits of the cause submitted for judgment; they constituted intrinsic, not extrinsic fraud. Fealey v. Fealey, 104 Cal. 354, 38 P. 49, 43 Am.St.Rep. 111; Tracy v. Muir, 151 Cal. 363, 90 P. 832, 121 Am.St.Rep. 117; Eisenmayer v. Thompson, 186 Cal. 538, 199 P. 798.

The plaintiff presents other facts in his complaint the effect of which, he argues, was fraudulently to prevent the full consideration of the trustee reports on their merits. One fact which the plaintiff stresses is the limited description in the reports of the investment covered by the report. For example, in the third and fourth reports, the only ones of real significance as we shall note, the description of the assets of the trust was in these terms: "List of Assets Held in Above Trust: Participation Certificates issued pursuant to section 104 of California Bank Act, representing interest in the following loan: Series 6800/289 Rate 7% Par Value 3,000.00." We are of the opinion that this description was sufficiently specific so that it cannot be said that the probate court was prevented from considering the report on its merits, nor was the plaintiff hindered from making any objection that he might have desired to make, to the report. His ignorance that he had a ground upon which to object is beside the point. This language in Tracy v. Muir, supra, 151 Cal. 363, 372, 90 P. 832, 835, 121 Am.St.Rep. 117, is apposite: "It can be no excuse for his failure to appear and contest that he did not know that the alleged will was not genuine. That it was genuine was one of the very issues tendered him by his adversary, which he was called upon to meet within the time allowed by law or forever thereafter admit." See, also, Abels v. Frey, supra, 126 Cal.App. 48, 14 P.(2d) 594.

At a time fixed no more definitely than that it was during the year 1931, the plaintiff, seeking a small advance from his trust funds, was told that if he "were of the attained age of 30 years said plaintiff could have the total payment of said trust, to-wit: the sum of $3,000.00." This statement, the complaint alleges, was made to induce the plaintiff to believe that his funds were wisely invested, and the corpus of the trust was safe, and he did so believe. The complaint not only fails to allege that this statement deterred the plaintiff from thereafter questioning at any hearing the wise investment of his funds, but it also fails to aver that the statement when made was not true. It was not until after the third account current had been settled and allowed that we are told that the security was inadequate, by which time the third investment had apparently been made. Certainly, so far as appears from the complaint, there was no loss as a result of the first two certificates purchased; the loss alleged to have befallen the trust estate is in the worthlessness of the certificate now owned and which first appears in the third report.

[7] We are somewhat at a loss to understand the implications of the allegations contained in paragraph XIII of the complaint. This paragraph begins by stating "that the only notice of the hearing of said accounts, other than said fourth and final account * * * which said plaintiff had was in the form of a letter substantially as follows:" Then appears a letter reciting that it enclosed a formal notice of the hearing "of our current account as Trustee," and continuing, "There is no requirement that you attend this hearing, but the notice is sent to bring it to your attention so that you may attend if you so desire." Then follows a suggestion in the complaint that the letter had something to do with the failure of the plaintiff to attend the hearing on the final account. Violating the accepted rule of construction by interpreting these allegations most favorably to the pleader, even so they do not make out a case of extrinsic fraud. The allegations are insufficient to show that the notices required by law had not been given. Abels v. Frey, supra, 126 Cal.App. 48, 14 P.(2d) 594. There is no allegation that the letter was intended to keep the plaintiff from attending any hearing on a current account and making any objection thereto. At most, the

receipt of the letter is offered as another circumstance explaining why the plaintiff had no suspicions that his trust estate was not wisely invested. There is no allegation that the letter was sent with the intent that his suspicions should be allayed. Facts which explain why a beneficiary's suspicions are not aroused of themselves do not constitute fraud.

Allegations of the complaint not referred to in this opinion do not supplement those mentioned sufficiently to make out a cause of extrinsic fraud.

The judgment is affirmed.

KEY NUMBER SYSTEM

BARKER BROS., Inc., v. CITY OF LOS ANGELES.*

Civ. S. C. 30.

District Court of Appeal, Second District, Division 1, California.

April 30, 1937.

Hearing Granted by Supreme Court June 28, 1937.

1. Statutes ⇐245
Taxation ⇐2

Power to levy tax must be drawn from express statutory authority, and statute must be strictly construed in favor of taxpayer and against taxing body.

2. Licenses ⇐7(3)

License tax may not be imposed on one when others doing same business are exempt.

3. Licenses ⇐7(3)

That method of carrying on one's business differs from that followed by another in same business does not warrant imposition of a license tax on one if not placed on the other.

4. Licenses ⇐15(1)

Division of a store carrying on well-recognized business into departments or sections does not constitute the store a "department store" within ordinance imposing a license tax upon department stores.

5. Licenses ⇐15(1)

Arranging various kinds of furniture into departments or sections did not convert a furniture store into a "department store" within ordinance imposing a license tax upon department stores.

6. Licenses ⇐15(1)

Word "or" within ordinance imposing a license tax on "any store which is commonly known as a department store or any store where a variety of goods, wares and merchandise are arranged in or offered for sale from several departments or sections" *held* not used to introduce a second class of stores which must pay a license but was used in sense of "that is to say" or "to-wit," and word "variety" meant not a variety in one class of goods but a variety in classes of goods themselves.

[Ed. Note.—For other definitions of "Or" and "Variety," see Words & Phrases.]

7. Licenses ⇐15(1)

Store, over 98 per cent. of whose business was the sale of furniture and household goods and which had a few minor departments selling hosiery and lingerie, children's clothing, toys and candy, *held* not a "department store" within ordinance imposing a license tax upon department stores.

8. Commerce ⇐64

So much of store's income which was received from foreign or interstate business, even if amount of gross receipts from such sales amounted only to approximately one thirty-second of total receipts, could not be included in gross receipts by which any license tax of city was to be measured, since imposition of such tax would constitute a burden on interstate commerce.

9. Statutes ⇐64(8)

Whole license tax *held* not invalid because receipts by which tax was measured included receipts from sales in interstate and foreign commerce, where it was practicable to separate taxable gross receipts from nontaxable gross receipts.

10. Licenses ⇐34

Payment of department store license tax by store whose principal business was sale of furniture and household goods *held* not "voluntary" so as to preclude recovery of tax, since one who is confronted with possible alternative of paying tax or facing criminal prosecution, with possibility of fines and imprisonment, in a situation where le-

*For subsequent opinion see 76 P.2d 97.

gality of tax is debatable, does not voluntarily pay tax.

[Ed. Note.—For other definitions of "Voluntary Payment," see Words & Phrases.]

DORAN, J., dissenting.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Barker Bros. Inc., against the City of Los Angeles. From a judgment for defendant, plaintiff appeals.

Reversed.

Elvon Musick, Howard Burrell, E. Perry Churchill, and Clayton O. Straub, all of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Bourke Jones, C. P. Harrell, Jr., and Wm. Christensen, Deputy City Attys., all of Los Angeles, for respondent.

BISHOP, Justice pro tem.

Because we are of the opinion that the plaintiff's business was not included within those for which a license tax was required, and that plaintiff's payment of the tax was not voluntary, we have concluded that judgment should have been in its favor for the return of the tax, paid under protest.

Ordinance No. 56,600 of the City of Los Angeles, as amended, is the authority upon which the respondent city relies in support of the judgment denying the plaintiff any relief. Section 1 of the ordinance begins: "It shall be unlawful for any person * * * to commence or carry on any trade, calling, profession or occupation in this ordinance specified, in the City of Los Angeles, without first having procured a license from said city so to do. * * *" Elsewhere a violation of the ordinance is made a misdemeanor and each day's operation without a license is declared to be a separate offense. In section 128-c we find the provisions bringing the plaintiff's business within the scope of the ordinance, if any provision has that effect, in these words: "For every person, firm or corporation conducting, managing or carrying on any store which is commonly known as a department store or any store where a variety of goods, wares and merchandise are arranged in or offered for sale from several departments or sections, $7.50 for the first $15,000.00 or less of gross annual receipts received or derived from the conducting, carrying on or managing of such business and an additional 50 cents for each $1,000.00 or fractional part therof, of annual gross receipts in excess of $15,000.00. * * *"

The primary question presented by this appeal is a composite question of law and fact. The trial court answered it by declaring in its findings of fact "that at all times during the year 1934, the plaintiff was engaged in the business of conducting, managing and carrying on a department store where a large variety of goods, wares and merchandise were sold and delivered for sale from approximately thirty-nine different departments," and continuing in its conclusions of law "that plaintiff is a department store within the meaning of the provisions of Ordinance No. 56,600. * * *"

The evidence is without substantial conflict. It reveals that over 98 per cent. of the gross receipts upon which the plaintiff's license tax was based came from the furniture and house furnishing departments of plaintiff's store. In addition to its furniture and house furnishing department it had these few departments: Hosiery and lingerie, children's clothing, toys and candy. The annual receipts from all of these departments were less than 2 per cent. of plaintiff's total receipts.

[1] The conclusion we have reached follows ineluctably, in our opinion, from the application of several well-recognized principles. One of these appears in Los Angeles Brewing Co. v. Los Angeles (1935) 8 Cal.App.(2d) 379, 48 P.(2d) 65, 67, where the same license ordinance we are considering was under discussion. The learned justices of the District Court of Appeal, Fourth Appellate District, stated that the rule that "the power to levy a tax must be drawn from express statutory authority, and the statute must be strictly construed in favor of the taxpayer and against the taxing body," was a rule "too well established in California to need further citation of authority" than the case of RCA Photophone, Inc., v. Huffman (1935) 5 Cal.App.(2d) 401, 42 P.(2d) 1059, where other authorities are referred to. We should be governed, too, by the maxim of jurisprudence, found in section 3541 of the Civil Code, that "an interpretation which gives effect is preferred to one which makes void."

[2] The Los Angeles city charter places this restriction on the provisions of its licensing ordinances: "No discrimination in the amount of license tax shall be made between persons engaged in the same business, otherwise than by proportioning the tax to the amount of business done." Charter. art. I, § 3, par. 5. Not only does the charter prohibit the imposition of a tax on one when others doing the same business are exempt, but the State and Federal Constitutions contain provisions prohibiting such discrimination, as well. City of Los Angeles v. Lankershim (1911) 160 Cal. 800, 118 P. 215; Quaker City Cab Co. v. Pennsylvania (1928) 277 U. S. 389, 48 S.Ct. 553, 72 L.Ed. 927.

[3] That the method of carrying on one's business differs from that followed by another in the same business, does not warrant the imposition of a tax on the one if not placed on the other. Ex parte Richardson (1915) 170 Cal. 68, 148 P. 213.

[4] With these principles in mind let us assume, for the moment, that the plaintiff is engaged in no business other than selling household goods and furniture, a business for which there is no license tax provided in the ordinance. The fact that in the conduct of its business it had organized it into departments and sections would not make it a business subject to the license ordinance, which applies, as we have already noted, to "a store commonly known as a department store" or or "any store where a variety of goods * * * are sold * * * arranged in * * * several departments or sections." That is to say, first of all, the division of a store carrying on a well-recognized business into departments or sections does not constitute a store commonly known as a department store. We have in Los Angeles many stores commonly known as grocery stores which are divided into sections; in one you will find canned soup, in another crackers, and in still other sections soap, pickles, and sugars. The division of the grocery store into sections or departments for the more convenient sale of groceries does not make it a store commonly known as a department store. The ordinance in question prescribes a license tax for grocery stores and as well for other stores where a variety of goods are commonly arranged for sale in orderly fashion, that is, in sections, but where the variety is all within a class which gives the name to the store, and the name is not "department store."

[5, 6] Secondly, we do not believe that arranging various kinds of furniture into departments or sections converts a furniture store into a department store, within the meaning of the ordinance. To hold that it had that effect would result in furniture stores escaping taxation if they were conducted on the basis of a less orderly arrangement, but taxed if they grouped their wares in sections, a result to be avoided, if possible, because condemned in Ex parte Richardson, supra, 170 Cal. 68, 148 P. 213. This result is not necessary if, as is permissible (46 C.J. 1125), the word "or" is not used to introduce a second class of stores which must pay a license under section 128-c, but is used in the sense of "that is to say" or "to-wit." So understood, the section covers stores commonly known as department stores, that is to say, stores where a variety of merchandise is for sale in departments or sections. By "variety" is necessarily meant, not a variety in one class of goods, as, for example, in men's clothing, or household goods, but a variety in the classes of goods themselves. A store which handles automobile tires in one department, men's hats in another, books in another, women's dresses in another, and so on, is an example of what is commonly known as a department store and is the store which section 128-c meant to cover. So, far, therefore, as the trial court's conclusion that the plaintiff's store was covered by the ordinance is dependent upon its finding that "a large variety of goods, wares and merchandise were sold and delivered for sale from approximately thirty-nine different departments" in plaintiff's store, the conclusion was based on a misapprehension of the meaning of the ordinance.

Further to test the validity and the meaning of the ordinance, let us assume that it expressly omitted, as it does in fact, all furniture stores, but provided, as it does not openly, that stores selling furniture should pay a tax based upon their gross receipts from all sales if they sold, in addition, any goods whatsoever of a different class. Plainly, such an ordinance would work an unreasonable discrimination against the furniture dealer who added a soft drink counter to his business. The conclusion would be required in this case that plaintiff was being unreasonably discriminated against,

if the city's position is upheld, for plaintiff's store is, actually, a furniture and household goods store, selling in addition, a small quantity of other goods.

[7] The conclusion is not necessary, for it is not necessary to call plaintiff's store a department store. The sale of garden seeds in a hardware store does not change the character of the business of the store, although it may add one other business to it. The sale of candy by a furniture store does not destroy its character as a furniture store, although it may subject it to any license tax required for those engaged in selling candy. It is true, the addition of departments to departments eventually results in a store which has lost its character as a store of a type identified by one main class of goods; it becomes what is commonly known as a department store, where many classes of goods are sold in departments. It may be difficult to know when a hat store has become a department store. All that we need to decide in this case is that a store, over 98 per cent. of whose business is the sale of furniture and household goods, and which has only a few minor departments selling other merchandise, is not a department store within the meaning of Ordinance No. 56,600.

As it may develop, should this case be tried anew, that the plaintiff is indebted to the city for a license tax on the business it did other than as a furniture and house furnishing store, we note another ground of attack upon the judgment. The trial court found that in its business the plaintiff "does engage to some extent in interstate and foreign commerce," although it continued: "but that the amount of gross receipts derived from its sales of goods in interstate or foreign commerce amounts to approximately one thirty-second of plaintiff's receipts from its entire business; that said section 128-c of ordinance No. 56,600 does not constitute a burden on interstate or foreign commerce."

As we read Crew Levick Co. v. Pennsylvania (1917) 245 U.S. 292, 38 S.Ct. 126, 127, 62 L.Ed. 295, it requires the conclusion that the imposition of the tax exacted of the plaintiff does constitute a burden on interstate commerce. The Supreme Court was there considering the validity of a state merchandise license tax of one-half mill on each dollar of the whole volume, gross, of the annual business of those engaged as wholesale venders of or dealers in goods, wares and merchandise "The bare question, then," wrote Mr. Justice Pitney for the unanimous court, "is whether a state tax imposed upon the business of selling goods in foreign commerce, in so far as it is measured by the gross receipts from merchandise shipped to foreign countries, is in effect a regulation of foreign commerce. * * * We are constrained to hold that the answer must be in the affirmative. * * * The * * * imposition of a percentage upon each dollar of the gross transactions in foreign commerce seems to us to be, by its necessary effect, a tax upon such commerce, and therefore a regulation of it." In support of its conclusion the court cited many cases concerning which it said: "Most of these cases related to interstate commerce, but there is no difference between this and foreign commerce, so far as the present question is concerned." Speaking further of the tax, the opinion declares: "It operates to lay a direct burden upon every transaction in commerce by withholding for the use of the state, a part of every dollar received in such transactions. That it applies to internal as well as to foreign commerce cannot save it. * * * That portion of the tax which is measured by the receipts from foreign commerce necessarily varies in proportion to the volume of that commerce, and hence is a direct burden upon it."

[8, 9] We are of the opinion, therefore, that so much of plaintiff's revenues as is received from its foreign or interstate business may not be included in the gross receipts by which any license tax of the city is to be measured. As it is practicable to separate the gross receipts which may be taxed from those which may not be, the whole tax is not bad. Ratterman v. Western Union Teleg. Co. (1888) 127 U.S. 411, 8 S.Ct. 1127, 32 L.Ed. 229; Bowman v. Continental Oil Co. (1921) 256 U.S. 642, 41 S. Ct. 606, 65 L.Ed. 1139.

[10] The contention that plaintiff's payment of the tax was voluntary, and hence may not be recovered, we find answered by Vitale v. City of Los Angeles (1936) 13 Cal.App.(2d) 704, 57 P.(2d) 993, and cases there cited. The fiction that every one knows what is the law, which is a necessary fiction for many situations, and seems to have been the basis for the rule contended for by the plaintiff (Brumagim v. Tillinghast [1861] 18 Cal. 265, 79 Am.Dec. 176), is not necessary to accomplish justice in such a case as that under review. The necessity of a demand before suit affords the city an opportunity to escape litigation, if it desires.

One who is confronted with the possible alternative of paying a tax or facing criminal prosecution, with the possibility of fines and imprisonment, in a situation where the legality of the tax is debatable, cannot be said with reason to have voluntarily paid the tax, just because the long arm of the law has not actually reached out to grab him.

The judgment is reversed.

I concur: YORK, Acting P. J.

DORAN, Justice (dissenting).

I dissent. I am not at all in accord with the conclusion contained in the prevailing opinion; namely, that "All that we need to decide in this case is that a store, over 98 per cent of whose business is the sale of furniture and household goods, and which has only a few minor departments selling other merchandise, is not a department store within the meaning of ordinance No. 56,600," for several reasons: First, because the opinion does not define furniture and household goods; second, because to my mind the evidence does not show that only a few minor departments sold other merchandise; and, third, that the percentage of sales of one character of merchandise as compared with the others is not the true test for the determination of the question presented.

The ordinance reads: "For every person, firm or corporation conducting, managing or carrying on any store which is commonly known as a department store or any store where a variety of goods, wares and merchandise are arranged in or offered for sale from several departments or sections. * * *" The question is: Was there a variety of goods arranged in several departments or sections? The amount of sales in any one department as compared with the others is immaterial. The prevailing opinion injects into the ordinance the element of degree which obviously, to my mind, is beside the issue. The findings of the trial court in this regard are abundantly supported by the evidence. Indeed, the assistant controller of appellant testified as to the various sections through which goods, wares, and merchandise were sold by appellant, and, in brief, these sections, according to the testimony of the witness, included, besides sections selling furniture and similar objects, children's accessories, furniture rentals, repossessed merchandise, repairs and refinishings, rubber tile, linoleum, basement floor coverings, drapery hardware, drapery fabrics, window shades, wall paper, decorative sales, that is, paintings, oil paintings, china and glassware, silverware, printed pictures, art and gifts, linens, bedding, toys, desks, filing devices, electrical, small electrical equipment, vacuum cleaners, stoves, electrical refrigerators, electric laundry equipment, kitchenware, pianos, radios, confectionery, tapestries and art objects, contract wall beds, and a brokerage business. The witness furthermore testified that appellant maintained departments selling linens, blankets, and comfortables, silverware, jewelry, infants' ware, furniture including mattresses and springs, domestic floor covers and coverings, draperies, curtains, upholstery, lamps and shades, china and glassware, electrical household appliances, miscellaneous house furnishings, gift shop, radios, talking machines, and records, toys, candy; and further, that during the year 1934, a lingerie department, hosiery department, and clock department were maintained by appellant.

Thus the trial court found on sufficient evidence that appellant conducted a department store within the meaning of the section, and to my mind there is no reason suggested in the record for disturbing the trial court's judgment, for the evidence reveals that the foregoing merchandise was arranged in and offered for sale from several departments or sections.

From my viewpoint, the argument presented in the prevailing opinion which undertakes to compare the arrangement of soup and crackers in a grocery store and the sale of garden seeds in a hardware store, with conditions revealed by the record to have prevailed in appellant's place of business throws no light upon the questions presented for determination by this appeal.

The views expressed in the prevailing opinion would seem to have no stronger support in the evidence than is found in the fact that while, in truth, conducting a department store, appellant assumed the name of a furniture store.

20 Cal.App.2d 694

NOTTEN et al. v. MENSING et al.

Civ. 10511.

District Court of Appeal, First District, Division 2, California.

May 7, 1937.

Rehearing Denied July 1, 1937.

1. Wills ⇐306

Evidence relied upon to establish irrevocability of will must be indisputable (Civ.Code, § 1279; § 1624, subd. 6).

2. Wills ⇐306

Evidence, including mutual and reciprocal wills executed by husband and wife and statements by husband and wife that they trusted each other not to revoke such wills, *held* not to establish agreement not to revoke wills, where wills did not refer to each other nor to any collateral agreement (Civ. Code, § 1624, subd. 6).

3. Wills ⇐290

Party relying on alleged agreement to make joint irrevocable wills has burden of proving such agreement and scope thereof.

4. Specific performance ⇐49(2)

Where wife's estate was approximately 1,000 times as large as husband's estate, specific performance of alleged agreement by husband and wife to make joint irrevocable wills would not be enforced against wife's estate, since consideration for such agreement was inadequate (Civ.Code, §§ 3384–3391).

5. Wills ⇐188

Where no contract not to revoke joint wills was proven, no fraud could be charged and no estoppel created to preclude wife from exercising statutory right to revoke joint will (Civ.Code, § 1279).

Appeal from Superior Court, Ventura County; Harry R. Archbald, Judge.

Action by Henry Notten and others against Marques B. Mensing and others. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Edgar W. Howell and Sheridan, Orr, Drapeau & Bates, all of Ventura, and Ivan L. Smith, of Los Angeles, for appellants.

Don G. Bowker, of Los Angeles, and James C. Hollingsworth, of Ventura, for respondents.

STURTEVANT, Justice.

After this action was commenced the defendants appeared and demurred to the plaintiffs' complaint. The demurrer was sustained without leave to amend. From the judgment based on that order the plaintiffs appealed and the decision on appeal was filed April 30, 1935. Notten v. Mensing, 3 Cal.(2d) 469, 45 P.(2d) 198. After the remittitur was sent down the defendants answered. They denied all of the material allegations contained in the complaint of the plaintiffs. Thereafter a trial was had and later the trial court made findings in favor of the defendants. From the judgment entered on those findings the plaintiffs again appealed.

The plaintiffs contend that the findings are not supported by the evidence. In that connection they argue that certain witnesses gave testimony that was not contradicted by other witnesses, that it was testimony that was not inherently improbable, and therefore the trial court should have adopted it, but, on the other hand it rejected it. In so contending we think the plaintiffs fail to appreciate the reasoning of the trial court.

On the 30th day of September, 1921, John W. Notten and Carrie M. Notten were and had been for a number of years man and wife. On the date last mentioned they made their wills. The nature of those documents is sufficiently set forth in Notten v. Mensing, supra, with this exception: Both documents are strictly wills in form. Neither document purports to contain any language showing a collateral agreement between the spouses, that is, neither purports to be a contract not to revoke, as was the will involved in Warwick v. Zimmerman, 126 Kan. 619, 270 P. 612.

On February 13, 1929, Carrie M. Notten made another will purporting to revoke her former will. On October 16, 1933, she died and the will last mentioned was admitted to probate. In drawing their complaint the plaintiffs drew it on the theory that the wills dated September 30, 1921, were executed pursuant to an oral agreement that they were to be irrevocable and that neither the testator nor the testatrix would at any time revoke his or her will. Appreciating that an oral agreement of that kind is invalid and unenforceable (subdivision 6, § 1624, Civ. Code), the plaintiffs also set forth facts purporting to allege an estoppel of the defendants to rely on the statute of frauds. On the former appeal

(Notten v. Mensing, supra) the Supreme Court held that their pleading was sufficient.

[1] In presenting their case on its merits the plaintiffs called several witnesses and elicited testimony showing declarations made by John W. Notten and by Carrie M. Notten in which it was said, "we agree," or words to that effect. No single witness testified as to what the spouses agreed upon. No single witness, except Mr. Orr, even mentioned the word "revoke." Mr. Orr testified: "I told them that they understood of course that wills could be revoked, and they said yes, and Mrs. Notten said, 'I guess we can trust each other after all these years'; and John Notten smiled, and they looked at each other and said, 'Yes, I think we can.' " Those statements made to Mr. Orr do not show a promise not to revoke, but they imply that if either party did revoke, nevertheless he or she would act fairly. There is nothing in the record showing that the last will written by Mrs. Notten was not fair in every respect. Be that as it may, the testimony of Mr. Orr certainly does not bring this case within the rule, "To attribute to a will the quality of irrevocability demands the most indisputable evidence of the agreement, which is relied upon to change its ambulatory nature." Rolls v. Allen, 204 Cal. 604, 608, 269 P. 450, 452.

[2] Mrs. McBroom testified that on one occasion when she was in the home of the Nottens, Carrie M. Notten said in the presence of Mr. Notten, "that she and Uncle John had agreed to will the properties one to the other and for the use of the survivor during the life. And that the survivor was to make a will at his or her death and will the property *equally* between the families of both Uncle John and Aunt Carrie." Other witnesses testified using the same word *"equally."* The record discloses that on September 30, 1921, John W. Notten had surviving eleven nephews and nieces, children of deceased brothers and sisters. He also had living one sister and one brother. It also discloses that Mrs. Notten had living three nephews and nieces, children of a deceased brother, also three sisters and one brother, each of whom had children but who were not to inherit except as representatives of their parents. When speaking of dividing the property equally between the families of both spouses, no single witness testified to any facts showing how the property was to be apportioned among those numerous heirs. Not a single fact was developed showing Mr. Notten did or did not desire his brothers and sisters to be treated *equally,* or his nephews and nieces to be treated *equally.* The same remark applies to the kith and kin of Mrs. Notten. We note that the plaintiffs claim the two wills as executed show the property was to be divided *equally* between the two families. We think that claim is not sustained by anything contained in the record. It is based on an assumption that the entire estate when the wills were made was $4,000. There was no evidence to that effect. The value of the residue of the joint estate or the value of the entire estate in 1921 does not appear. There is not a word to indicate that the testator was dividing his property into two equal parts and then subdividing one of those equal parts among the heirs on one side and the other part among the heirs on the other side of the house. It is therefore clear that the evidence does not show Mr. and Mrs. Notten entered into any irrevocable agreement or that they entered into any agreement to the effect neither would later revoke his or her will. If, as some witnesses claimed, there was a purported agreement that they would each make a will equally dividing their properties, it is sufficient to say that, as shown above, neither party ever performed. In deciding the case the trial judge prepared a written memorandum of decision. We will not extend the length of this opinion by quoting therefrom, but it is perfectly clear he was attempting to explain to the parties and set forth the foregoing propositions. Furthermore, the trial court found the facts to be as recited above.

[3] It will be conceded that the two wills are mutual and reciprocal; but neither refers to the other nor to any collateral agreement, oral or in writing. He who contends there was such an agreement has the burden of proving it and the scope thereof. 69 C.J. 1303, Wills, § 2729. The two wills, standing alone, do not prove the existence of any collateral agreement. Rolls v. Allen, 204 Cal. 604, 269 P. 450; Beveridge v. Bailey, 53 S.D. 98, 220 N.W. 462, 60 A.L.R. 619. The two wills, taken together with all the oral testimony, do not show an irrevocable contract nor the terms thereof. The facts in the case before us, to say the least, are no stronger than were the facts in Beveridge v. Bailey, supra; In re Rhodes' Estate, 277 Pa. 450, 121 A. 327;

Edson v. Parsons, 155 N.Y. 555, 50 N.E. 265, 268; Wallace v. Wallace, 216 N.Y. 28, 109 N.E. 872; Menke v. Duwe, 117 Kan. 207, 230 P. 1065; Klussman v. Wessling, 238 Ill. 568, 87 N.E. 544, 547; Wanger v. Marr, 257 Mo. 482, 165 S.W. 1027; German v. Camburn, 154 Mich. 260, 117 N.W. 641. But in each of those cases the court held, as a matter of law, the evidence was insufficient to prove that the wills were made pursuant to a collateral agreement.

[4] Assuming for the purposes of this decision that there was a purported agreement between Mr. and Mrs. Notten, the question arises: Was the agreement in the instant case one a court of equity will enforce? In Edson v. Parsons, supra, the Supreme Court of New York enumerated the rules governing the court. It then said: "These rules require the contract to be certain and definite in all its parts; that it be mutual, and founded upon an adequate consideration; and that it be established by the clearest and most convincing evidence." In this state those rules are statutory. Civ. Code, §§ 3384—3391. In Klussman v. Wessling, supra, the Supreme Court of Illinois stated the same rule. It there set forth the facts in that case which showed that the surviving spouse would have taken under the law approximately what she would have taken under the will. The court quoted from Lord Walpole v. Lord Orford, 3 Ves. Jr. 402. It then added: "We should hesitate, on the evidence in this record, to hold that the consideration received by Louisa Grimsell under the will of her first husband was sufficient to require the enforcement of the alleged contract as to her will of that date." But the proportionate values of the properties of the respective parties in that case differed only as to a comparatively small sum. Whereas, in this case they differed in the proportion of a thousand to one, or thereabouts. In Haddock v. Knapp, 171 Cal. 59, 151 P. 1140, the court affirmed the judgment of the trial court in which it refused to compel the performance of a contract to exchange where the values stood as $2,800 to $1,400 because the consideration was not adequate. For this additional reason we think the trial court in the instant case did not err in denying a decree in favor of the plaintiffs.

[5] We pass now to the estoppel theory. It becomes necessary to state some additional facts as disclosed by the record. In the early nineties John W. Notten and Carrie M. Notten started to farm a tract in the Avenue section of Ventura county. They entered into a contract to purchase fourteen acres from A. D. Barnard. They gave back to the vendor a purchase-money mortgage. Mrs. Notten's brother, Herman R. Mensing, made financial contributions. The purchasers were unable to carry out their contract and a settlement was made under the terms of which five acres were retained and a deed was executed to Carrie M. Notten. Later she filed a homestead on that five acres. They conducted the farm and Mrs. Notten kept boarders. One of the boarders died leaving her a legacy of over $3,000 in cash. With that money she paid off some of the debts owing by her husband and herself and with the balance she purchased what is known as the Meta street property on which she was residing at the time of her death. That property was taken in joint tenancy by John W. Notten and his wife, Carrie M. Notten. In 1917 Carrie M. Notten executed an oil-well lease in which John W. Notten joined. The lease covered a tract including the five acres standing in the name of Carrie M. Notten. Other than household furniture, it does not appear that either spouse possessed any other properties when the wills were made. When John W. Notten died his wife presented his will for probate; it was admitted and duly probated. It transpired that he left an estate of $817.50. After expenses of the probate proceeding were paid, $634.87 was paid to the surviving widow. What she did with that money the record does not disclose.

Under the oil-well lease above mentioned, substantial rentals were coming in at about the time the wills were made or a little later. After the death of John W. Notten the rentals increased and the court found that "the reasonable value of the whole estate of Carrie M. Notten deceased, at the time of her death was the sum of $757,962.33." Looking back over all of the foregoing facts, we see nothing that would have justified the trial court in finding that an estoppel had arisen in favor of the plaintiffs. In short, we think it clearly appears that under the facts shown by the record before us Carrie M. Notten never entered into a contract, orally or in writing, agreeing not to revoke her will. That being so, she had the statutory right to revoke. Civ. Code, § 1279. Under such circumstances no fraud could be charged and no basis for an estoppel was created.

As we understand them, the defendants contend that even though the spouses en-

tered into an agreement not to revoke, the fact Mrs. Notten accepted $634.87 under the will of her husband would not give rise to an estoppel against them. Rolls v. Allen, 204 Cal. 604, 269 P. 450. They call to our attention that she could have asked for a family allowance and there would have been nothing left in the estate of John W. Notten. They also claim the said sum was not such a substantial sum as would have warranted the chancellor in finding that the defendants were estopped when nearly $800,000 was involved. As we have held the finding of the trial court that the Nottens never entered into a contract not to revoke was sustained by the evidence, it is unnecessary for us to pass on the contention last made.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

KEY NUMBER SYSTEM

20 Cal.App.2d 674

PEOPLE v. COWEN.

Cr. 2937.

District Court of Appeal, Second District, Division 1, California.

May 6, 1937.

Hearing Denied by Supreme Court May 27, 1937.

Criminal law ⇐1216(2)

Where judgment on charge of attempted robbery said nothing of how it was to run, sentence of five years *held* to run consecutively to sentences for two other charges ordered to run concurrently, one for life and the other for shorter period, under statute providing that imprisonment for a second, or a third conviction, as the case might be, must commence at termination of preceding one, although court could in its discretion direct them to run concurrently (Pen.Code, § 669, as amended by St.1927, p. 1056).

Appeal from Superior Court, Los Angeles County; Robert B. Lambert, Judge.

Earl S. Cowen was convicted of attempted robbery, robbery and rape, and from an order denying a motion to determine the running of sentence, he appeals.

Affirmed.

Earl S. Cowen, in pro. per.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

YORK, Justice.

This is an appeal from an order of the trial court denying a motion made by appellant pursuant to section 669 of the Penal Code to determine the running of sentence. Appellant was charged, tried, and convicted upon two informations, the first containing a single count of attempted robbery; the second containing two counts, one of rape and one of robbery. Judgment was pronounced and sentence imposed for all three counts on the 19th day of May, 1930. The judgments on the rape and robbery counts were ordered to run concurrently, but nothing is said in the judgment on the charge of attempted robbery as to how it should run with reference to the other two. It was also found that appellant had been convicted of a prior felony and had served a term of imprisonment therefor.

Appellant contends, because the state board of prison directors has seen fit to treat the judgment in the case of attempted robbery as being a judgment to follow after the expiration of the life term imposed on the robbery charge, hence resulting in a difference of five years in the length of his imprisonment, that he has the right to a determination by the court as to how the judgment in the attempted robbery case shall run. In support of his contention, he argues that, since he is serving a term of less than for life for the crime of rape, which term runs concurrently and is merged with the life sentence for the crime of robbery, the greatest possible term he may serve is for life, and it necessarily follows that the judgment on the charge of attempted robbery should run concurrently, he claiming that it is a legal absurdity to hold that he should serve such term consecutively to a life term.

At the time of appellant's conviction, section 669 of the Penal Code read as follows: "When any person is convicted of two or more crimes the imprisonment to which he is sentenced upon the second or other subsequent conviction must commence at the termination of the first term of imprisonment to which he shall be adjudged, or at the termination of the second or other subsequent term of imprisonment, as the case may be; provided, that

in exceptional cases the judgment, in the discretion of the court, may direct that such terms of imprisonment, or any of them, shall run concurrently." Stats.1927, p. 1056.

In the case of People v. Hayes, 9 Cal. App.(2d) 157, 49 P.(2d) 288, the defendant was convicted of the crime of first-degree robbery and on May 25, 1928, was sentenced to imprisonment in the state prison at Folsom. After he had begun to serve his term under said sentence, he was indicted and brought before the court on robbery charges, entered pleas of guilty, and judgments were pronounced on April 26, 1929, sentencing him on each conviction to the state prison at Folsom. Thereafter, in April, 1935, defendant made a motion to vacate and set aside the judgments of April 26, 1929, on the ground that "they fail to state when they shall commence, and that if they commence upon the termination of the sentence under the prior conviction then the two later judgments and sentences would unenforceable, since the first sentence was a sentence for life to which no further period of imprisonment could possibly be added."

It was there said [at page 160 of 9 Cal. App.(2d), 49 P.(2d) 288, 290]: "But even where a defendant is already under a life sentence or even a sentence of death, this does not afford him immunity from prosecution and conviction of other offenses; nor does it preclude the court from passing judgment and sentence upon a subsequent conviction. The fact that a prisoner who serves a life term, and, while serving such, dies in prison cannot serve other sentences imposed for other offenses and running consecutively does not prevent, as a matter of law, the imposing of such consecutive sentences even though, as stated in Re Woofter, 134 Cal.App. 580, 583, 25 P.(2d) 859, the additional penalty cannot be imposed, i. e., actually inflicted, upon such life termer. It might also be mentioned that even where a prisoner is serving a life sentence this does not of necessity mean that he will remain in prison until he dies. Parole, commutation, or pardon may release him from prison long before his term of life ends." The court then quoted from section 669 of the Penal Code, as it then read and as it read at the time of the convictions in the case before us, and held that "the sentences by operation of law run consecutively."

Upon the authority of the cited case and said section 669 of the Penal Code (as was in effect at the date of sentence herein), we are of the opinion that the sentence on the charge of attempted robbery by operation of law runs consecutively to the sentences on the other two charges.

The order appealed from is therefore affirmed.

We concur: HOUSER, P. J.; DORAN, J.



RAGGIO et al. v. MALLORY et al.*

Civ. 10096.

District Court of Appeal, First District, Division 1, California.

April 23, 1937.

Rehearing Denied May 22, 1937.

Hearing Granted by Supreme Court June 21, 1937.

1. Appeal and error ⇐977(5)
New trial ⇐6

Refusal to grant new trial is largely in discretion of trial court, and its action will not be set aside where there appears to be reasonable, or even fairly debatable, justification therefor.

2. Appeal and error ⇐930(1)

In action for injuries from motorist's negligence, in determining whether there was sufficient legal support in evidence for judgment denying recovery, all legal intendments were in favor of judgment, and all conflicts in evidence would be resolved in favor of respondents.

3. Negligence ⇐7

Ordinarily, it is necessary to exercise greater care for protection and safety of young children than for protection and safety of adults possessing normal and mature faculties, and that which would be considered ordinary negligence in reference to adults may be gross negligence as respects a child.

4. Negligence ⇐7

One should anticipate thoughtlessness and impulsiveness in conduct of a young child.

5. Automobiles ⇐162(8)

Presence of small children playing in street or near curbing should be warning to drivers of passing automobiles requiring ex-

*For subsequent opinion see 76 P.2d 660.

ercise of care for their safety, and such duty extends not only to children playing in street, but also to children playing near street.

6. Automobiles ⇐162(1)

One driving vehicle even at lawful speed must not assume that children of immature age will not expose themselves to danger.

7. Automobiles ⇐244(59)

Evidence that motorist driving twenty-five to thirty miles per hour two feet from curb six inches square on right side of bridge did not sound horn until automobile was twenty or thirty feet from children with backs to automobile, and that twelve year old boy was injured when he jumped backwards from curb on which he was standing while hanging over rail *held* not to support judgment denying recovery for motorist's negligence under last clear chance doctrine, whether or not boy was contributorily negligent.

KNIGHT, J., dissenting.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by John Raggio, a minor, by Guiseppi Raggio, his guardian ad litem, and Guiseppi Raggio, against Barbara Mallory and others. From an adverse judgment and an adverse order, plaintiffs appeal.

Reversed.

Rehearing denied; KNIGHT, J., dissenting.

Martinelli & Gardiner, of San Rafael, and Herbert Chamberlin, of San Francisco, for appellants.

J. Hampton Hoge, of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for respondents.

TYLER, Presiding Justice.

Action for personal injuries. The complaint contained two causes of action directed against the three named defendants. The first cause of action alleged that on December 5, 1934, and while John Raggio, a minor then twelve years of age, was a pedestrian on a bridge forming part of the public highways in Marin county, he was negligently struck and injured by an automobile driven by defendant Barbara Mallory, also a minor. It was further alleged that the automobile was owned by defendant Helen Mallory; that she was a passenger in it at the time of the accident; that the daughter was driving the car with the knowledge and permission and as agent of the mother. After detailing his injuries, plaintiff John Raggio, through his guardian ad litem Guiseppi Raggio, alleged general damages in the sum of $10,000, and plaintiff Guiseppi Raggio, the father, prayed for consequential damages in the sum of $1,057.81. The second cause of action duplicated the allegation of the first and added a paragraph averring that defendants Presley Mallory and Helen Mallory had signed an application of their minor daughter Barbara for a license to operate motor vehicles. A joint answer filed by defendants contained a general denial and a special defense that plaintiff John Raggio was guilty of contributory negligence. After trial the jury found a verdict in favor of defendants, which recited that they were not guilty of negligence. Motion for a new trial was made and denied. This is an appeal from the judgment and order.

As grounds for a reversal, appellants claim that the judgment lacks evidentiary support for the reason that the record establishes that negligence of Barbara Mallory was the sole proximate cause of the accident in which plaintiff minor was injured. They also claim that the trial court misdirected the jury to the prejudice of the plaintiffs.

Briefly stated, the facts show that John Raggio a minor twelve years of age, received the injuries complained of on the Alto bridge in Marin county. The bridge is some seven hundred feet long and twenty-one feet wide. At each side thereof and abutting the pavement is a wooden curb or wheel guard approximately six inches square, and abutting each curb is a wooden rail guard three feet high built on wooden posts six feet three inches apart extending the entire length of the bridge. The bridge surface is thirty-four feet above the Northwestern Pacific Railroad Company tracks, which run under the bridge north and south at approximately the center of its length. At the time of the accident plaintiff minor with some youthful companions was walking along the north side of the bridge. When he reached a point above the railroad tracks he became engrossed in a passing electric train. He thereupon stopped, mounted the wooden curb, leaned over the wooden rail and directed his attention downward to the train, at which he threw some pebbles or dirt. While he was thus engrossed in play a Ford coupé approached the bridge at a

speed of thirty-five to forty miles an hour. It was driven by defendant Barbara Mallory. Her mother, defendant Helen Mallory, was an occupant of the machine. As the car was driven upon the bridge its progress was slowed down to approximately twenty-five or thirty miles, as testified to by the mother and daughter. The car was traversing the bridge equidistant between the wooden curb at the north side thereof and a white line marking the center of the pavement, which left a margin of some two feet on either side of the car. From a point some hundred and fifty to two hundred feet away the driver of the automobile saw plaintiff leaning over the north guard rail engrossed in watching the train which was passing under the bridge. The driver did not at this time sound her horn or give any signal of her approach. When some twenty or thirty feet away the mother directed the attention of her daughter to the presence of plaintiff and his companions and she replied that she saw them, and for the first time sounded her horn some two to four times. At this moment the boys had their back to the approaching car and remained at play, and the driver of the car and her mother saw nothing, so they testified, to indicate to them that the boys heard the horn or knew of their approach for they were still engaged in their play. Notwithstanding this fact defendant driver continued with undiminished speed an undeviating course until the accident occurred, the right front fender and light of the automobile striking plaintiff and causing the injuries complained of. Just prior to the impact an automobile was approaching in the opposite direction, but it was well over on its own side of the road and did not prevent the turning of defendants' machine from the course it was traveling. At the trial the theory of the accident on the part of plaintiffs was that the child was struck without warning by the automobile while he was standing with his right foot on the pavement and his left foot on the wooden curb looking over the guard rail. That of the defendants was that he suddenly jumped backwards against the automobile when it was opposite him. There was evidence to show that the injured plaintiff jumped back to avoid the conductor of the train seeing him. Whatever caused him to jump, we are of the opinion that the facts show beyond question that the driver of the car was guilty of negligence as a matter of law and that her acts were the sole proximate cause of the injury.

[1, 2] In reaching this conclusion we are not unmindful of the rule that a refusal to grant a new trial is largely in the discretion of the trial court and its action will not be set aside by the appellate court where there appears to be reasonable or even a fairly debatable justification therefor. The question then is as to whether there is sufficient legal support in the evidence for the judgment in the case. In determining this question all legal intendments are in favor of the judgment, and all conflicts in the evidence must be resolved in favor of the respondents. Here, however, there is no conflict in the evidence and it establishes that the negligence of defendant driver was the sole proximate cause of the injuries suffered by the injured plaintiff.

It is respondents' position in support of the judgment that the evidence is sufficient to show that defendant driver was free from negligence; that plaintiff minor was in a place of safety when the automobile approached him; that the car was being operated at a moderate and careful speed on a proper place upon the highway and the driver of the car had no reason to believe that the injured child would jump in front of the automobile she was driving. There is no force in the argument. The evidence shows that there was a complete failure on the part of the driver of the car to use ordinary or any care at any time for the safety of the child. She saw the children when one hundred to two hundred feet away and did not take the precaution to sound her horn, although the rate of speed she was traveling would bring her opposite them in a few seconds. She delayed this precaution until within twenty or thirty feet of them, notwithstanding she and her mother saw nothing in their conduct which indicated to them they were aware of their peril, as their backs were turned toward respondents and they were still engaged in play. The driver had time and opportunity to change her course or stop, but she did neither, driving on without change of speed or direction and applied her brakes only after striking plaintiff. The sounding of her horn when twenty or thirty feet away from the children, at the rate she was traveling, brought her machine abreast of them in a second's time; she was covering from thirty to forty-four feet a second. The sounding of her horn under these circum-

stances was no warning, being almost a simultaneous act with the striking of the child. The situation might well have suggested to her that the children would become startled and jump back in the path of her car. The authorities in this state support this conclusion.

In Scandalis v. Jenny, 132 Cal.App. 307, 22 P.(2d) 545, the defendant failed to sound his horn until he was within a few feet of a child playing in the street, and it was held that he should have been fearful that the child thus startled by the nearness of the horn might well be expected to spring into his path and that ordinary care on his part should have led him to give way, or, if he could not do so, to slow down or stop until the hazard that confronted him had been removed. In this case a judgment in favor of defendant was reversed. One is bound at his peril to exercise ordinary care to anticipate danger. Soda v. Marriott, 118 Cal.App. 635, 5 P.(2d) 675.

[3-7] It is well established that it is ordinarily necessary to exercise greater care for the protection and safety of young children than for adult persons possessing normal and mature faculties. One should anticipate thoughtlessness and impulsiveness in the conduct of a young child. Shannon v. Central-Gaither U. School Dist., 133 Cal.App. 124, 23 P.(2d) 769; 45 Cor.Jur. 702. That which would be considered ordinary negligence in reference to a grown person may be gross negligence as respects a child. Parra v. Cleaver, 110 Cal.App. 168, 294 P. 6. The presence of small children playing in a street or near the curbing should be a warning to drivers of passing automobiles requiring the exercise of care for their safety. Seperman v. Lyon Fire Proof Storage Co., 97 Cal.App. 654, 275 P. 980. The belated sounding of the horn under the circumstances did not show any care on the part of the driver. Respondents argue that plaintiff was in a place of safety and had he not stepped therefrom he would not have been injured; that defendant driver had no reason to believe he would do so. It cannot be said that standing on a curb six inches square under the circumstances in this case constituted a position of safety for a child. The law is clearly established that the duty of a motorist to take precautions for the safety of children at play extends not only to children playing in the street, but also to children playing near the street. Waterbury v. Elysian Spring Water Co., 139 Cal.App. 355, 33 P.(2d) 1048. Defendant driver had no right to assume that the child would remain indefinitely hanging over the rail, especially when she was in doubt about the boys' knowledge of her approaching car. She was bound to anticipate that he would move at any time, in which event he would be directly in her path. Children must be expected to act upon childish instincts and impulses; others are chargeable with a duty of care toward them and must calculate upon this and take precaution accordingly. When children are plainly visible a driver's obvious duty on approaching the spot is to have his car under such control as the circumstances demand, so that, responsive to the child's capricious acts, he can stop to avoid injury. One driving a vehicle even at a lawful rate of speed must not assume that children of immature age will not expose themselves to danger. Negligent indifference to the safety of children and others occurs with alarming frequency. Here, as stated, it appears that defendant driver was doubtful as to whether the children knew of her approach, for she testified that nothing occurred to indicate such knowledge on their part, and yet she drove on at a speed of twenty-five miles an hour without any slackening of her speed, or deviation in her course, and struck the minor plaintiff, inflicting serious injury. With the exercise of the slightest care she had every opportunity of avoiding the injury. Failing to exercise any care, her act under the circumstances was the sole proximate cause of the injury, for which she is responsible even if it be assumed that the child was guilty of negligence in jumping back without looking, as defendant knew or ought to have known the danger he was in, of which danger he was unaware. She had the last clear chance to avoid the injury and she failed to avail herself of it. Girdner v. Union Oil Co., 216 Cal. 197, 13 P.(2d) 915. This conclusion renders unnecessary a discussion of the instructions complained of.

The judgment and order are reversed.

I concur: CASHIN, J.

KNIGHT, Justice.

I dissent. The jury was called upon to decide two main issues of fact—the alleged negligence of the driver of the automobile, and the alleged negligence of the plaintiff. By rendering a general ver-

dict for the defendants it found in favor of defendants and against plaintiff on both issues. Subsequently the trial court considered the question of the sufficiency of the evidence on motion for new trial, and by its denial of the motion it approved the findings of the jury on both issues. As said in Bellon v. Silver Gate Theatres, Inc., 4 Cal.(2d) 1, 47 P.(2d) 462, when on appeal a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. The same principle is stated in California Jurisprudence, vol. 2, p. 912, as follows: "An appellate court possesses none of the functions of a jury, and cannot assume to exercise them. While the question of the sufficiency of the evidence, as a matter of law, to support a verdict or finding may be presented to the appellate court for review, its duty stops when it has determined that there is some substantial evidence to support it. It will not weigh the evidence, pass upon the credibility of witnesses, nor substitute its judgment thereon for that of the trial court, but will uphold the verdict or finding even though it would have decided otherwise if it had occupied the place of the trial judge or jury." Furthermore, it is well settled that in reviewing evidence on appeal all conflicts must be resolved in favor of the prevailing party and all legitimate inferences indulged in to uphold the verdict if possible. The evidence most favorable to the prevailing party must not only be taken as true, but it must be construed most strongly against the appellant, and in the light most favorable to the respondent; and if there is any substantial evidence to support the conclusions reached by the jury, or if the verdict can be sustained on any reasonable theory, shown by the evidence, a reversal is not justified. Even though two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court. In other words, the appellate court may not invade the province of the jury and retry facts which are sufficient to support the verdict. Therefore, under the foregoing rules, in order to justify the judgment of reversal directed by the majority opinion herein, it must appear not only that the conclusions reached by the jury and the trial court on both issues are wholly without evidentiary support, but that contrary to such conclusions the contradicted and uncontradicted evidence given on the part of defendants is susceptible of but one construction, namely, that the driver of the car was negligent, that such negligence was the sole proximate cause of the accident, that there was no negligence whatever on the part of plaintiff contributing thereto.

The record shows that the accident happened between 3 and 4 o'clock in the afternoon, in a forty-five mile an hour zone; and in substance the evidence adduced on the part of the defendants was as follows: Miss Mallory testified she drove upon the bridge at a speed of "about thirty-five miles an hour; thirty to thirty-five"; that she saw the boys when about one hundred fifty to two hundred feet distant from them; that they were then standing at the crest of the bridge, clear of the traveled portion thereof, leaning over the bridge rail, looking down on the electric car tracks immediately below them, and throwing something at the electric train which was passing underneath the bridge; that she was traveling in the center of the marked traffic lane, and when about one hundred feet distant from the boys she reduced her speed to about twenty-five miles an hour, and it may have been less; that when "about thirty feet" from them she sounded her horn two or three times; that at that time the boys were still in the same position, leaning over the rail, clear of the traveled portion of the bridge; and while they were in that position and without increasing her speed she proceeded to pass them, but that just as she drew up parallel with them plaintiff jumped backward suddenly from the rail of the bridge directly into the pathway of the automobile, and was struck by the right front fender; that the suddenness with which plaintiff sprang in front of her car gave her no opportunity to divert the course of the car; that all she could do was to apply the brakes, which she did immediately and brought the car to a complete stop within a car's length from the point of the impact. The testimony given by Miss Mallory's mother was to the same effect. She fully corroborated her daughter as to the operation of the automobile, the location of the boys at the rail of the bridge, the slackening of the speed of the automobile, the sounding of the horn, and as to the circumstances attending the accident. With respect to the latter, she testified that from the time they first saw

the boys until the instant of the accident, the boys remained at the rail of the bridge, off the traveled portion thereof; and that when the automobile was directly opposite them plaintiff, without warning, jumped suddenly backward from the rail into the pathway of the automobile, and that there was no way to avoid striking him. Moreover, the testimony of both Miss Mallory and her mother as to the sounding of the horn and the circumstances attending the accident was fully corroborated by one of plaintiff's companions, named Lloyd Perkins, aged eleven years. He testified he was standing beside plaintiff at the rail of the bridge, and saw him jump backward suddenly into the pathway of the automobile. This witness also gave a clear explanation as to the reason plaintiff suddenly leaped backward from the bridge rail. In this regard he testified that he and his companions, including plaintiff, were leaning over the bridge rail throwing small rocks and clods of dirt at the train passing underneath; that a clod of dirt thrown by plaintiff struck the train and he said to plaintiff, "Nice shot, Johnny"; that just then the train passed from underneath the bridge and the conductor, who was standing on the rear platform, looked up at them; that in order to avoid being seen plaintiff jumped backward suddenly from the rail right into the pathway of the automobile. The witness also corroborated the testimony of Miss Mallory and her mother that the car was stopped immediately following the impact. Furthermore, the evidence shows that the bridge is part of the main highway; that plaintiff lived in that neighborhood, and consequently was familiar with the automobile traffic passing over the bridge; that he was past twelve years of age, in good health, mentally bright and active, and therefore subject to the doctrine of contributory negligence. Moeller v. Packard, 86 Cal.App. 459, 261 P. 315, 317; Richardson v. Ribosso, 120 Cal.App. 641, 8 P.(2d) 226; Studer v. Southern Pacific Company, 121 Cal. 400, 53 P. 942, 66 Am.St.Rep. 39; De Nardi v. Palanca, 120 Cal.App. 371, 8 P.(2d) 220; Greeneich v. Knoll, 73 Cal.App. 1, 238 P. 163; 2 Cal.Jur., Ten Year Supp., §§ 277, 278, pp. 441, 443, 445.

In the face of the foregoing facts, and keeping in mind the legal rules governing appellate courts in reviewing evidence on appeal, I am unable to agree with the majority opinion that the verdict of the jury and the conclusions reached by the trial court in passing on the motion for a new trial, are wholly without evidentiary support. To the contrary, it appears from said facts that at the time of the accident the automobile was being driven well within the statutory speed limit; that from the moment the boys first came into view of the driver up to the instant of the accident they were never on the traveled portion of the bridge, but at all times remained standing at the rail of the bridge, out of the pathway of the automobile; that while so standing in that position they were in an apparent place of safety, and that the driver of the automobile, before attempting to pass them, sounded her horn as a warning of her intention so to do. The jury and the trial court were justified in concluding, therefore, in my opinion, that the driver of the automobile was not negligent in the operation of her car and that the accident was proximately due to the fact that plaintiff, without exercising any caution whatever for his own welfare, leaped backward suddenly from his place of safety onto the traveled portion of the bridge directly in the pathway of the oncoming automobile.

As to the sounding of the horn, the record discloses that at the trial plaintiff claimed it was not sounded at all, and that therefore such omission constituted negligence on the part of the driver; whereas on the appeal it is contended that although the horn was sounded, the driver was nevertheless guilty of negligence, first, because in sounding it not more than thirty feet from him it may have startled him and caused him to jump backward; secondly, because if the horn had been sounded when the driver first came in sight of the boys plaintiff would have been warned of the approach of the automobile. Clearly, however, plaintiff is not in a position now to claim he was startled by the sounding of the horn because according to his own testimony he did not hear it; and if he did not hear it when sounded thirty feet from him, the jury was evidently warranted in the belief that he would not have heard it if it had been sounded one hundred fifty or two hundred feet from him.

The majority opinion, as will be noted, holds in effect, contrary to the conclusions reached by the jury and the trial court, that despite the fact that the boys were at all times off the traveled portion of the highway and therefore would not have been injured if they had remained in that position, they were not in a place of safe-

ty; that such being the case, the driver of the car was negligent as a matter of law in proceeding to pass them without first ascertaining whether they heard the horn and what they intended to do; furthermore, that such negligence was the sole proximate cause of the accident. It would seem, however, that in so holding the majority opinion is at variance with the decisions in the cases of Moeller v. Packard, supra, and Richardson v. Ribosso, supra, wherein judgments in favor of the defendants were affirmed. In the former case the driver of the car observed four children walking along the highway ahead of him. One of them was eight and a half years old. A car approached in the opposite direction, and the children stepped off the paved portion of the highway to the unpaved portion thereof. While they were in that position the defendant, without sounding his horn, attempted to pass them at a speed of twenty-five miles an hour, and when within forty feet of them, the child eight and a half years old "suddenly ran out onto the paved portion of the highway to recover some article that had blown from her hand," into the pathway of the automobile, and was fatally injured. In the Richardson Case, the injured child was seven years old, and was seen by the defendant playing on the sidewalk with other children. He slackened his speed, but did not sound his horn or give any other signal of danger, and suddenly the injured child ran diagonally across the street into the side of the automobile. In each case, in sustaining the conclusions reached by the jury and trial court as to want of negligence on the part of the driver, the judgment of affirmance is evidently based upon the premise that since the child was off the traveled portion of the highway, it was in a place of safety, and that under such circumstances the operator of the automobile was not negligent in attempting to pass at a prudent rate of speed; that he had the right to assume that the child would not suddenly place itself in a position of danger without first exercising reasonable care to assure its own safety.

In any event, the question of whether or not a pedestrian, child, or adult, who is off the traveled portion of the highway when the driver of an automobile proceeds to pass him, is in a position of safety, is doubtless one of fact; and in view of the affirmative findings of the jury and the trial court in the present case, and similar conclusions reached by the trial and appellate courts in the two cases above cited, it would appear that the most that can be said is that the issue is one upon which reasonable minds might differ. Consequently, under the legal rules above set forth, it is beyond the power of the reviewing court herein to substitute its deductions for those of the jury and the trial court.

The cases of Scandalis v. Jenny, 132 Cal. App. 307, 22 P.(2d) 545, and Soda v. Marriott, 118 Cal.App. 635, 5 P.(2d) 675, upon which the majority opinion appears to be based, involved facts essentially different from those of the present case. They were cases of infants playing in the traveled portion of the street. Obviously, therefore, they were not in places of safety, and the drivers were negligent in proceeding without first ascertaining that the infants had reached places of safety. That is to say, in the Scandalis Case, the injured child was three years old, and was seen by the driver of the automobile playing in the street directly in the pathway of his automobile, with its back turned toward the automobile and looking down. And in the Soda Case the child was four and a half years old and was observed by the driver of the automobile running on the traveled portion of the highway directly toward the machine, pursued by an adult person who was attempting to catch and hold him. Moreover, on account of the age of the injured infants, the doctrine of contributory negligence was not made an issue in either of those cases; whereas here the age of the child was such that contributory negligence was available and pleaded as a defense; and in this regard it would seem that the evidence above narrated, showing that plaintiff jumped backward suddenly from his place of safety at the bridge rail onto the traveled portion of the bridge, directly into the pathway of the oncoming automobile without first looking for approaching cars, is legally sufficient to support the conclusions reached by the jury and the trial court that his injuries were due to his own carelessness.

The majority opinion does not discuss or definitely decide the question of the sufficiency of the evidence relating to the issue of contributory negligence, but it is stated therein that even though it be assumed that plaintiff was guilty of contributory negligence, the driver of the car had the last clear chance to avoid the

collision. In this connection the record shows that the doctrine of the last clear chance was not made an issue at the trial by the evidence or the instructions. The point is urged for the first time on appeal. However that may be, in order to invoke such doctrine in any given case the following elements must be present: (1) That the plaintiff has been negligent; (2) that as a result of such negligence plaintiff placed himself in a position of danger from which he could not escape by the exercise of ordinary care; (3) that defendant was aware of plaintiff's dangerous situation and realized or ought to have realized plaintiff's inability to escape therefrom; (4) that defendant had the last clear chance to avoid the accident by the exercise of ordinary care, and that he failed so to do. Darling v. Pacific Electric Ry. Co., 197 Cal. 702, 242 P. 703; Young v. Southern Pacific Co., 189 Cal. 746, 210 P. 259. Here, as shown, when Miss Mallory proceeded to pass plaintiff he was leaning against the bridge rail, clear of the pathway of automobile traffic and consequently in an apparent place of safety. Therefore there is no ground for holding that at that time plaintiff was in a dangerous situation from which he could not escape by the exercise of ordinary care, or that she realized or ought to have realized he was in such dangerous position. Richardson v. Ribosso, supra. And the answer to the suggestion that she might have avoided striking him as he sprang backward into the pathway of her automobile, by diverting the course of the automobile, is to be found in the testimony given by her and her mother, which the jury and the trial court accepted as true, to the effect that plaintiff leaped backward so suddenly she had no opportunity to do anything more than to apply the brakes, which she did. Furthermore, the evidence shows that when plaintiff leaped backward in front of her car she was driving within two feet of the middle lane defining the traffic lane in which she was required to travel, and that as she neared the boys she observed an automobile approaching in the opposite direction, which was brought to a stop only eight feet from the point of impact at the time the impact occurred. Therefore, in view of the foregoing situation, the jury might reasonably have concluded that any attempt on her part to divert her course at that time would have been a dangerous undertaking.

Every one agrees that it is the duty of operators of motor vehicles constantly to keep in mind the probability of encountering other persons using the streets and highways either as pedestrians or motorists; and that where children are observed playing in or near the street, extra precautions should be taken for their safety. Such is the doctrine expressed in all the decisions, and too much cannot be said to that end. And it is a matter of common knowledge that juries and trial courts have not been reluctant to decide against drivers when there was evidence to show they failed to exercise such precautions, nor have reviewing courts hesitated to affirm such judgments. But it does not follow from the fact that a child of the age of discretion darts into the street in front of an automobile and is injured, that the driver of the car is to blame for the accident. Here, from all the evidence before them, the jury and the trial court found that the driver was not to blame, and it is my conclusion that said findings are not without evidentiary support, and that therefore the judgment should be affirmed.



20 Cal.App.2d 598

SIMS v. CROWLEY.

Civ. 10182.

District Court of Appeal, First District, Division 1, California.

April 30, 1937.

Hearing Denied by Supreme Court June 28, 1937.

1. Licenses ⇐39

Maker could not complain that judgment on notes given in part payment of purchase of stock was violative of condition imposed by original permit issued by corporation commissioner to the effect that owners of stock should not consummate sale thereof without written consent of commissioner, where commissioner expressly sanctioned entire transaction by giving his written consent at different times and issuing several permits for consummation of sale.

2. Corporations ⇐121(1)

On default in payment of one of series of notes given in part payment of purchase of stock under agreement providing that ti-

tle to stock should remain in seller until notes were paid and that all notes should become due on default in payment of any of notes, seller could recover on all the notes as against contention that buyer had option not to complete purchase and had exercised option by concluding not to purchase.

3. Sales ⇐479(15)

In cases of conditional sales, where title is retained in vendor until property is paid for, failure of buyer to meet payment of notes given as part of purchase price gives vendor right to treat sale as absolute and to sue for balance of purchase price as evidenced by notes.

4. Bills and notes ⇐327

Whether or not plaintiff suing on notes was holder in due course *held* immaterial, where all defenses available against payee were urged against plaintiff and were found to be without merit (Civ.Code, § 3133).

5. Appeal and error ⇐1071(6)

Judgment on notes given in part payment of purchase of stock would not be reversed for failure to find on material issue concerning alleged violation of Corporate Securities Act, where it appeared from the evidence that finding, if made, would have been adverse to appellant (St.1917, p. 673, as amended).

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by J. M. Sims against David Crowley. From a judgment for the plaintiff, the defendant appeals.

Affirmed.

Joseph E. Isaacs and Alan H. Critcher, both of San Francisco, for appellant.

Howe & Rumwell, of Palo Alto, for respondent.

KNIGHT, Justice.

This is an action to collect two promissory notes, one for $1,500 and the other for $2,000, given by the defendant, David Crowley, to John Rossi, in part payment of the purchase of corporate stock, and subsequently indorsed without recourse to the plaintiff, J. M. Sims. Among the defenses pleaded was the violation of the state Corporate Securities Act (St.1917, p. 673, as amended). Judgment was entered in plaintiff's favor, and defendant appeals.

The transactions leading up to the execution, delivery, and indorsement of said notes were as follows: Sims and Rossi owned all of the issued class A stock of the Bayshore Garbage Company, consisting of 150 shares. Sims owned 76 shares thereof, and Rossi 74 shares. The stock was issued and deposited in escrow pursuant to a permit issued by the corporation commissioner, which provided that "the persons entitled to said shares shall not consummate a sale or transfer of said shares, or any interest therein, until the written consent of said Commissioner shall have been obtained so to do." On February 19, 1934, Rossi obtained an option from Sims to purchase 74 shares of his stock, and Sims agreed to accept in payment thereof two notes given to Rossi by Crowley. On the same day Rossi entered into a written agreement with Crowley to sell the latter 75 shares of said stock. The agreement recited, among other things, that the stock was then held in escrow under a permit issued by said commissioner; that Crowley desired to purchase 50 per cent. thereof, and to pay therefor with his promissory notes. It then provided for the sale to Crowley of 75 shares for $8,000, payable as follows: A 90-day note for $1,000; a 180-day note for $2,500; an 8-month note for $1,000; an 8-month note for $1,500; and a 14-month note for $2,000, all bearing interest at 6 per cent. per annum. The agreement then went on to provide that the first three notes, aggregating the sum of $4,500, should be turned over to, become the assets of, and made available as capital for, said corporation; that when said notes were paid class B stock of the par value of $4,500 should be issued to Rossi. It was further provided that upon default in payment of any of said notes, all of them should become immediately due and payable; that the stock Crowley was purchasing should remain in escrow subject to the permit of the corporation commissioner, and should not be delivered or transferred to Crowley until all notes were paid, unless the parties agreed in writing that a portion of the stock be transferred to Crowley while the stock was in escrow; furthermore, that until all notes were paid the stock should remain the property of Rossi, and any amounts previously paid thereon should be considered liquidated damages, in case of default in payment of the balance.

On March 1, 1934, the corporation commissioner gave his consent to the transfer of Sims' 74 shares to Rossi. On May 9th he gave his consent for the release from escrow for cancellation of the 150 shares, and on the same day issued a permit authorizing the sale of 75 shares to Crowley for $8,000; and on June 7th he issued two additional permits authorizing the sale by Rossi to Crowley of respectively 75 shares and one share.

Default was made in the payment of the $1,500 note; and thereupon the holder elected to declare the other note immediately due, and, after making demand for payment thereof, brought suit on both notes.

[1] Appellant contends as one ground for reversal that the transactions had between the parties involving the sale of the stock to Crowley was violative of the condition imposed by the original permit issued by the corporation commissioner to the effect that the owners of said stock "shall not consummate a sale or transfer" of the stock until "the written consent of said Commissioner shall have been obtained so to do." Obviously, however, there is no merit in the point because, as will be noted from the undisputed facts hereinabove set forth, the corporation commissioner expressly sanctioned the entire transaction by giving his written consent at different times and issuing his several permits for the consummation of the sale.

[2, 3] Appellant further contends that, since the agreement provided that title in the stock should remain in Rossi until the notes were paid, it was optional with appellant whether or not he would complete the purchase, and, having concluded not to do so, no recovery may be had on the notes. The contention is without merit. In cases of conditional sales, where title is retained in the vendor until the property is paid for, the failure of the buyer to meet the payment of notes given as part of the purchase price gives the vendor the right to treat the sale as absolute and to sue for the balance of the purchase price as evidenced by the notes. Waltz v. Silveria, 25 Cal.App. 717, 145 P. 169; Johnson v. Kaeser, 196 Cal. 686, 239 P. 324; Bagwill v. Spence, 127 Cal.App. 263, 15 P.(2d) 810.

[4] The further point is made that Sims was not a holder in due course of the notes sued upon. The facts show, however, that his case was brought clearly within the provisions of section 3133 of the Civil Code defining a holder in due course. But whether he was or was not a holder in due course would seem to be immaterial because, so far as the record shows, all available defenses that appellant could have urged against Rossi, if he had sued, were urged against Sims and found to be without merit.

[5] It is also contended that the judgment must be reversed for failure of the trial court to make a finding on the issue raised by the special defense that the sale of the stock was made in violation of the Corporate Securities Act. It is well settled, however, that a judgment will not be reversed for failure to find on a material issue where it appears from the evidence, as here, that the finding if made would have been adverse to the appellant. Sheppard v. Yale, 94 Cal.App. 104, 270 P. 742; Hulen v. Stuart, 191 Cal. 562, 572, 217 P. 750; Krasky v. Wollpert, 134 Cal. 338, 66 P. 309.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.



20 Cal.App.2d 580

STOODY CO. v. VALLEY PIPE & WELDING CO. (BAKER, Intervener).

Civ. 1367.

District Court of Appeal, Fourth District, California.

April 28, 1937.

1. Appeal and error ⇐173(2)

In conditional seller's action in claim and delivery, conditional buyer, which failed to plead waiver of strict compliance with requirement of conditional sales contracts for monthly installment payments, and failed to raise such issue in trial court, *held* not entitled to raise issue on appeal.

2. Sales ⇐477(6)

Conditional seller's acceptance of overdue installments on purchase price would not waive provision of conditional sales contracts for forfeiture on nonpayment of future installments on dates specified, where contracts provided that time was of the essence thereof.

3. Sales ⇐479(7)

In conditional seller's action in claim and delivery, buyer's contention of relinquishment and waiver of seller's right to retake property was an affirmative defense which buyer had burden of establishing.

4. Assignments for benefit of creditors ⇐ 332.

Conditional seller's right to retake property under contracts whereby seller retained title would not be waived by seller's execution of agreement whereby buyer made general assignment for benefit of part of his creditors and creditors covenanted not to sue, where assignment agreement did not refer to property claimed by seller, and did not limit time within which purposes of agreement were to be consummated.

5. Assignments for benefit of creditors ⇐ 340(3)

Where conditional buyer and part of his creditors executed agreement whereby buyer assigned assets to trustees for benefit of such creditors and creditors covenanted not to sue, conditional seller, who demanded surrender of possession from buyer, *held* not required to make such demand of trustees to maintain action in claim and delivery, whether or not seller was one of creditors who executed assignment agreement.

6. Assignments for benefit of creditors ⇐ 340(4)

In conditional seller's action in claim and delivery, trustees under agreement whereby buyer made general assignment for benefit of part of his creditors and creditors covenanted not to sue, *held* not necessary parties defendant, whether or not seller executed assignment agreement, where one trustee was permitted to intervene and other trustee answered to complaint in intervention.

Appeal from Superior Court, Kern County; S. L. Strother and A. Caminetti, Jr., Judges.

Action by the Stoody Company against the Valley Pipe & Welding Company, wherein defendant filed a cross-complaint, C. Fred Baker intervened, and E. G. Cutshall filed an answer to the complaint in intervention. From an adverse judgment, defendant and intervener appeal.

Affirmed.

Brittan & Mack, of Bakersfield, for defendant appellant.

Alfred Siemon, of Bakersfield, for intervener appellant.

Borton & Petrini, J. O. Reavis, and R. W. Henderson, all of Bakersfield, for respondent.

JENNINGS, Justice.

Plaintiff instituted this action in claim and delivery against the defendant to recover possession of certain machinery and equipment which it had contracted to sell to defendant under two contracts of conditional sale. Trial of the action before the court without a jury resulted in the entry of a judgment in plaintiff's favor whereby it was decreed that plaintiff should recover possession of the property mentioned in the complaint and that in case delivery of the property could not be had plaintiff should recover from defendant the specified value of said property. From the judgment thus rendered the defendant and the intervener, C. Fred Baker, have appealed. The latter appellant has filed no brief on appeal and apparently relies on the contentions advanced by the defendant Valley Pipe & Welding Company. Proper consideration of these contentions requires a statement of the facts that were developed by the evidence produced during the trial.

The two contracts of conditional sale set out in plaintiff's complaint were executed on January 16, 1929, and March 5, 1929. By the former contract plaintiff agreed to sell and defendant agreed to buy certain specified machinery and equipment for the sum of $3,801.61, of which amount the sum of $500 was paid on the date the contract was executed and the remainder of the purchase price was to be paid in specified monthly installments beginning on February 25, 1929. Each monthly payment scheduled to be made thereafter was to become due on the 25th day of the month. It was expressly provided that no condition of the contract should be deemed waived by the seller by any previous waiver or in any other manner except by a writing signed by an authorized executive of the seller. It was agreed that, if the buyer should perform all conditions and pay all sums required by the terms of the contract, the seller would execute and deliver to the buyer a good and sufficient bill of sale to the property but that, if the buyer should fail to perform any condition of the contract on its due date or should be declared a bankrupt

or permit an attachment or execution to remain on the property for a period of 24 hours, the seller might, at its option, repossess the property and in such event any sum theretofore paid by the buyer should be retained by the seller as the value of the use and rental of the property and its depreciation. It was further stated in the agreement that time was of the essence of the contract by express agreement of the parties. With the exception of the date of execution, the description of the property sold, the purchase price, the amount of each of the monthly installments, and the date on which the first of such monthly payments should be made, the second contract is in all respects precisely similar to the first. On January 3, 1930, a contract entitled "Assignment to Trustees For Benefit of Creditors" was executed by defendant. Certain creditors of the defendant, including the plaintiff and the intervener, were mentioned in this contract as parties of the second part. This agreement was executed by the intervener and was apparently executed by plaintiff. This instrument will hereafter receive further consideration in connection with one of the contentions advanced by defendant on this appeal. Evidence as to which there is no conflict was produced which showed that at no time were the monthly payments specified in the contract of January 16, 1929, made on the dates on which they were due, but that on November 15, 1929, all of such payments then due including the installment due on October 25, 1929, had been made. The monthly installments due on November 25, 1929, and December 25, 1929, were not paid and were past due when this action was commenced on February 6, 1930. The uncontradicted evidence which was produced with respect to payments made by the defendant on the unpaid balance of the purchase price specified in the conditional sale contract of March 5, 1929, showed that the first payment was made on June 29, 1929. The amount of the payment was $445.38. At the time it was made three monthly installments whose total amount was $710.37 were past due. One other payment of $222.69 was made on August 6, 1929, at which time the unpaid installments that were past due on the purchase price amounted to $501.78. At the time the complaint in the present action was filed the total amount of unpaid and past due installments on this contract was $1,499.82. This amount comprised monthly payments due in July, August, September, October, November, and December of 1929, and the payment agreed to be made on January 25, 1930. In addition to these defaults with respect to the payment of monthly installments the evidence also showed that on December 26, 1929, the intervener brought an action against the defendant claiming that the latter was indebted to him for goods, wares, merchandise, and labor furnished to defendant in the amount of $1,959.40 and that on said date a writ of attachment issued and was levied on the equipment and machinery in defendant's place of business in the city of Bakersfield. The evidence also showed that a second attachment suit was filed against the defendant by another creditor on either January 22, or January 27, 1930.

The first contention advanced by the appellant, Valley Pipe & Welding Company, is that respondent waived its right to insist upon strict compliance with the terms of the conditional sales contracts requiring payment of monthly installments to be made on specified dates by its acceptance of such payments on dates subsequent to those designated in the contracts. It is apparently urged that respondent was not entitled to maintain this action to repossess the property for appellant's default in the matter of making monthly payments because on a number of occasions respondent accepted payment of monthly installments after they were due.

[1, 2] The contention thus advanced is entirely lacking in merit and may not prevail. In the first place, the appellant, Valley Pipe & Welding Company, did not either in its answer or in the cross-complaint which it filed in this action plead this alleged waiver as a defense to respondent's cause of action or make it an issue in the case. This appellant is not now therefore entitled to rely upon it for the first time on appeal. In the second place, if it be conceded that respondent waived its right to terminate the contracts and repossess the property for appellant's default in making certain payments on the due dates specified in the contracts by its acceptance of such payments on dates later than the due dates it did not thereby waive its right to insist that future payments should be made on the dates provided in the contracts. It is settled that the acceptance of overdue installments on the purchase price of property sold under an executory contract does not of itself change the terms of the contract as to

forfeiture for future failures nor eliminate a provision that time is of the essence of the contract. Benedict v. Greer-Robbins Co., 26 Cal.App. 468, 147 P. 486; De Bairos v. Barlin, 46 Cal.App. 665, 674, 190 P. 188; Pacific Finance, etc., Co. v. Pierce, 48 Cal.App. 600, 191 P. 1115; Brown v. Chowchilla Land Co., 59 Cal.App. 164, 210 P. 424; McConnell v. Redd, 86 Cal.App. 785, 790, 261 P. 506; Christin v. Story, 119 Cal.App. 326, 6 P.(2d) 301.

The second and chief contention urged by appellant, Valley Pipe & Welding Company, relates to the instrument which was apparently executed by respondent on January 3, 1930, and which is entitled "Assignment To Trustees For Benefit of Creditors." The first paragraph of this document recites that it is made between the Valley Pipe & Welding Company as party of the first part, Stoody Company, Linde Air Products Company Pacific Coast, and Fred Baker, parties of the second part, "and the several persons creditors of the Valley Pipe and Welding Company, a corporation, who have executed or shall hereafter execute, or accede to these presents, parties of the third part." The instrument then recites that whereas the party of the first part is indebted to divers persons in considerable sums of money which it is at present unable to pay in full and is desirous of conveying all its property for the benefit of all its creditors to designated trustees until all of its obligations shall have been paid, the said party of the first part "hereby grants, bargains, sells, assigns, and conveys" unto the persons named as trustees all its lands, property, etc., of every kind and character. The document then purports to empower the designated trustees at their direction to conduct the business of the Valley Pipe & Welding Company to the end that the business may yield as much profit as can be derived for various specified purposes which may be condensed into a statement that the first party's debts and current expenses shall be paid and any surplus remaining shall be turned over to the Valley Pipe & Welding Company. The parties of the second part agree to employ the president of the last-mentioned corporation as manager of the business at a specified compensation. Various other provisions not material to the problem here under consideration and which need not therefore be mentioned are included in the instrument. There is, however, a clause upon which especial reliance is placed by appellant, Valley Pipe & Welding Company, and which is particularly important on this appeal. It is as follows: "Upon the due execution of this agreement by the respective parties of the first and second part, and upon a payment being made to Fred Baker of the second part, in the sum of Five Hundred Dollars ($500.00) in cash, the parties of the second part hereby agree to release any and all attachments now existing and to refrain from suing said party of the first part in full and faithful performance of the covenants herein mentioned." The instrument was executed by the Valley Pipe & Welding Company and by the intervener, Fred Baker. It was apparently executed also by the Linde Air Products Company, Pacific Coast, and by the respondent, although the trial court made a negative finding in this regard. It was not executed by any other creditor of the Valley Pipe & Welding Company. In our opinion it is at least doubtful whether or not the finding that the instrument was not executed by respondent has proper evidentiary support to sustain it. We prefer therefore to assume that it was executed by respondent and to give consideration to the hereafter stated contention of appellants on the basis of such an assumption.

It is urged by appellants that the above-described instrument constituted a complete and valid trust agreement executed by the Valley Pipe & Welding Company and its three largest creditors whereby all of the property and assets of the Welding Company were transferred to the trustees designated in the instrument for the benefit of all creditors of the Welding Company with the express consent and approval of the respondent and the two other creditors by whom the agreement was executed. It is maintained that the failure of smaller creditors to join in the agreement is of no importance as it is said the evidence failed to show any dissatisfaction on their part with the terms of the agreement which it is argued respondent had to show in order to sustain its contention that the trust agreement was incomplete and invalid. It is particularly contended that the covenant by respondent not to sue the Valley Pipe & Welding Company is binding upon respondent and that respondent's execution of the agreement which included this covenant accomplished a waiver by respondent of its right to repossess the property which it had sold to the Welding Company by the two conditional sales contracts heretofore described. Some mention of the state of facts which existed at the time

the agreement of January 3, 1930, was executed may be of assistance in giving proper consideration to this contention.

On the last-mentioned date the appellant Valley Pipe & Welding Company did not have sufficient funds to meet its current obligations. As above noted, it had defaulted in the payment of several monthly installments which it had agreed to make by the terms of the two conditional sales contracts entered into with respondent. In addition to the amount which it owed respondent under these contracts it was also indebted to respondent in the sum of $1,876.08 on an open book account. It owed the intervener the sum of $1,959.40 and as heretofore stated an action for the recovery of this indebtedness had been brought on December 27, 1929. In addition to the three creditors of the Valley Pipe & Welding Company who signed the assignment to creditors instrument of January 3, 1930, and who were the largest creditors there were approximately 49 other general creditors to whom the Valley Pipe & Welding Company was indebted in a total amount which exceeded the sum of $5,000. This was the situation with respect to the financial condition of the Valley Pipe & Welding Company which existed on January 3, 1930.

[3, 4] It is our conclusion that the contentions of the appellants as to the effect produced upon respondent's cause of action by its execution of the assignment contract of January 3, 1930, may not be sustained. It is not contended, as we understand, that title to the property which was the subject of the conditional sales contracts passed to the Valley Pipe & Welding Company under the terms of these contracts. The language of these agreements indicates that it was the intention of the parties thereto that title to the property should remain in the seller until the specified purchase price was fully paid by the buyer. When the agreement of January 3, 1930, was executed, therefore, the title to this property was not in the Valley Pipe & Welding Company but was in respondent, and the language of the agreement whereby appellant purported to convey and assign to designated trustees all property of every character could not of itself operate to divest respondent of the title to the property which it had sold to appellant under conditional sales contracts that were in full force and effect. It would, in our opinion, be a most unusual and strained construction to place upon the instrument of assignment to declare that thereby respondent intended to relinquish its right to repossess its own property, a right expressly reserved to it by the provisions of the conditional sales agreements, particularly when it is remembered that respondent was not only the largest secured creditor of appellant but that it was also the second largest unsecured creditor, its claim in this capacity being only $83 less than the claim of the intervener. It must further be remembered that the contention of relinquishment and waiver of the right to retake the property was an affirmative defense raised by appellant and that upon appellant was imposed the burden of establishing this defense to the satisfaction of the trial court. This burden was not met merely by proof of the execution by respondent of the assignment agreement of January 3, 1930, containing the covenant not to sue. There is no reference in the last-mentioned agreement to the specific property covered by the conditional sales contracts and no limitation of the time within which the expressed purposes of the assignment agreement are to be consummated. Apart from this, however, it is apparently the position of appellants that the inclusion of the covenant not to sue obligated respondent to stand idly by even though creditors who had not assented to the agreement and who could not therefore be bound by it should by proper legal action enforce their claims by seizure and sale of all the property and assets of the debtor. So unreasonable a construction is not in our opinion warranted by the language of the instrument nor by the circumstances which surrounded its execution.

Appellants further contend that two defects which are fatal to the validity of the judgment rendered by the trial court appear in the proceedings. These are, first, that respondent failed to join the two trustees named in the assignment to creditors agreement as parties defendant to the action and, second, that there is no evidence that a demand for surrender of the property sought to be repossessed was made upon the trustees.

[5, 6] It is our conclusion that this contention is devoid of merit. This conclusion necessarily follows from the heretofore expressed opinion that the assignment agreement of January 3, 1930, did not operate to vest title to the property sold under the conditional sales contracts in the trustees.

If, as we think, the trustees did not acquire legal title to the property they were neither necessary nor proper parties to this action and no demand upon them for surrender of the property was necessary as a prerequisite to institution of the suit. With respect to the feature of demand the trial court expressly found that demand for return of the property was made by respondent on appellant, Valley Pipe & Welding Company, on or about January 30, 1930, and that this appellant failed and refused to surrender possession in compliance with the demand so made. The record indicates that there is evidence to support the finding and it is our opinion that this is a sufficient answer to the contention respecting lack of demand. It may further be observed with regard to the objection that the trustees were not joined as defendants in this action that the trustee, Fred Baker, was permitted to intervene in the suit and to litigate fully his claims and that the other trustee, E. G. Cutshall, filed an answer to the complaint in intervention filed by his cotrustee. It is apparent therefore that the complaint of appellants relative to the failure of respondent to have included the trustees as parties defendant is entirely lacking in merit. The trustees were before the court and whatever rights they may have had as trustees were fully presented.

For the reasons stated the judgment from which the appeals have been taken is affirmed.

We concur: BARNARD, P. J.; MARKS, J.



20 Cal.App.2d 700

PEOPLE v. TUX WINERY CO.

Civ. 11351.

District Court of Appeal, Second District, Division 2, California.

May 7, 1937.

1. Taxation ⇐526

Tax is not ordinarily collectible until time has arrived which is fixed in statute for its payment or collection.

2. Intoxicating liquors ⇐90(1)

Excise tax on distilled spirits *held* not collectible on sales of distilled spirits prior to sale to retailer (St.1935, pp. 1132, 1135, 1139, §§ 24, 29, 33).

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by the People against the Tux Winery Company. Judgment for the defendant, and the plaintiff appeals.

Affirmed.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

Benjamin J. Goodman, of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This is an appeal from a judgment after an order sustaining a general demurrer to plaintiff's complaint without leave to amend. In the complaint the plaintiff sued the defendant for certain excise taxes alleged to have been due on sales of distilled spirits, made by wholesalers to wholesalers, but not to retailers.

The sole question necessary for the determination of the appeal is this: Is the excise tax on distilled spirits under the Alcoholic Beverage Control Act (Stats.1935, p. 1123) collectible on sales of distilled spirits at a time prior to a sale to a retailer? If the tax is collectible prior to a sale to a retailer, the judgment should be reversed; if not, it should be affirmed. It is not contended that more than one excise tax is collectible upon the same liquor.

The decision calls for a construction of sections 24, 29, and 33 of said act, and the parts of said sections necessary for ready information are as follows:

"Sec. 24. An excise tax is hereby imposed upon all distilled spirits sold in this State on and after July 1, 1935."

"Sec. 29. No excise tax shall be imposed by this act in any transaction whereby any alcoholic beverages are sold and delivered by a manufacturer or importer to another manufacturer or importer holding a valid manufacturer's or importer's license."

"Sec. 33. The tax imposed by section 24 of this act upon the sale of distilled spirits shall be collected by means of attaching to each package containing such distilled spirits a stamp or stamps of a denomination equivalent to the amount of excise tax imposed upon the sale of the contents of such package. Such stamps shall be attached by the holders of on- or off-sale distilled

spirits licenses issued under this act and by the holders of on-sale licenses for liquor other than beer and wine issued under the State Liquor Control Act [in this opinion called retailers], immediately upon opening the original cases in which the distilled spirits were packed and in which such distilled spirits were purchased from the manufacturer, rectifier, importer or wholesaler [in this opinion called wholesalers]. In the case of distilled spirits not in original cases at the time of purchase the stamps shall be attached immediately upon bringing such distilled spirits upon the premises for which such on- or off-sale licenses are issued.

"Such stamps shall be sold by the board [of equalization] only to persons holding valid distilled spirits manufacturer's licenses, rectifier's licenses, distilled spirits and wine importer's licenses or distilled spirits wholesaler's licenses issued under this act or the State Liquor Control Act; provided, that until July 1, 1935, the board shall sell a sufficient number of such stamps, to stamp stocks of distilled spirits on hand, to persons holding valid on- or off-sale licenses for liquor other than beer and wine issued under the State Liquor Control Act; provided further, that the board may thereafter, in its discretion, sell such stamps to such holders of on- or off-sale distilled spirits licenses as it may determine.

"On and after July 1, 1935, all distilled spirits delivered by any manufacturer, rectifier, importer or wholesaler of distilled spirits to any person holding an on- or off-sale distilled spirits license issued under this act or an on-sale license for liquor other than beer and wine issued under the State Liquor Control Act, must be accompanied by a sufficient number of stamps purchased from the board, to stamp the packages containing such distilled spirits. Every manufacturer, rectifier, importer or wholesaler of distilled spirits who delivers distilled spirits in violation of this section shall be guilty of a misdemeanor.
* * *

"The board shall have full charge and control of the issuance, securing, or purchase and of the sale of all such stamps and shall keep a record of all stamps sold.

"At the time such stamps are attached to the packages of distilled spirits, they shall immediately be canceled by indelibly writing or stamping thereon the number of the licensee attaching the stamp and the date of cancellation."

It will be observed that nothing is said in the statute about the payment of the tax, but that specific details are given as to when and how the tax shall be collected, and a penalty is imposed for a failure to comply with such provisions. The tax "shall be collected by means of attaching to each package containing such distilled spirits a stamp or stamps." The stamps shall be sold only to wholesalers, and upon the delivery of the liquors from the wholesaler to the retailer they must be accompanied by the stamps. But the stamps shall be attached only by the retailer and the tax shall be collected by attaching such stamps immediately upon opening the original cases in which the distilled spirits were packed and in which such distilled spirits were purchased from the wholesaler. At the time such stamps are attached to the individual packages they shall immediately be canceled.

[1, 2] The sales for which the plaintiff seeks a collection of the tax were sales from one wholesaler to another wholesaler prior to a sale to a retailer. The contention of the plaintiff is that there is no statement in the law as to which sale is the taxable sale, and hence the only conclusion that can be drawn is that the first sale is the taxable sale, except as such sales may be otherwise exempted by the act; that such an exemption is found in the first paragraph of section 29, above quoted, and therefore this exemption is the only exemption from the tax upon first sales and this exemption does not include the sales for which a tax is herein contended for. A more reasonable view is that a tax is not ordinarily collectible until the time has arrived which is fixed in the statute for its payment or collection.

Another contention of the plaintiff is fairly and accurately stated in its own language as follows: "The tax is money; and when the tax is collected by the State it collects money. And before such stamps leave the possession of the State the money, or tax, must be paid to the State for such stamps. Obviously, then, the State in every instance collects its tax at a time antedating the affixing of the stamps to the bottles of distilled spirits. What was really meant by the legislature by the use of the word 'collected' in section 33 was that the affixing of the stamps should be evidence of the tax having been paid; so that section 33 should read as follows: 'The tax imposed by section 24 of this act upon the

sale of distilled spirits shall be evidenced by means of attaching to each package containing such distilled spirits a stamp or stamps of a denomination equivalent to the amount of excise tax imposed upon the sale of the contents of such package.'"

In our view this is a strained construction of the statute. While it is true that the money is paid when the stamps are purchased; nevertheless the stamps may be used for the liquor involved or they may be used to evidence the tax on other liquors, and so for all practical purposes the tax is not collected until the stamps are attached to specific packages.

The Legislature has furnished a well-rounded program for the collection of the tax and the enforcement of the law. The plan is understandable and workable. It provides for the collection of the tax upon the sale by a wholesaler to a retailer at the time the wholesale package is opened up so that the stamps may be placed upon the individual packages. The tax is not collectible at a prior time.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, J.



20 Cal.App.2d 748

The PEOPLE of the State of California, Plaintiff and Appellant, v. Paul HENDRICKSON, Doing Business under the Fictitious Firm Name of Jinricky Company, Ltd., Defendant and Respondent.

The PEOPLE of the State of California, Plaintiff and Appellant, v. HOME BRAND BOTTLING COMPANY, Defendant and Respondent.

The PEOPLE of the State of California, Plaintiff and Appellant, v. JINRICKY COMPANY, Inc., Defendant and Respondent.

Civ. 11391, 11392, 11393.

District Court of Appeal, Second District, Division 2, California.

May 7, 1937.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

Erwin P. Werner and Edward Linder, both of Los Angeles, for respondents.

CRAIL, Presiding Justice.

These three cases are similar in the pleadings, except as to names and amounts, and in the judgments rendered, to the case of People v. Tux Winery Company, 67 P. (2d) 752, this day decided by this court. The appeals were taken five weeks later. The parties have now stipulated in writing that these cases may be submitted for decision on the briefs on file in the Tux Winery Company Case.

For the reasons stated in the decision in that case, we also affirm the judgments in these cases.

Judgments affirmed.

We concur: WOOD, J.; McCOMB, J.



20 Cal.App.2d 666

In re CONMY.

Cr. 1561.

District Court of Appeal, Third District, California.

May 5, 1937.

1. Drunkards ⇐2(1)

Fact that warrant for arrest of one charged with having lost power of self-control through excessive use of intoxicating liquors was not signed by magistrate who issued it did not affect superior court's jurisdiction to hear case and determine whether facts stated in affidavit for warrant were correct and accused's condition such as to warrant his commitment to state hospital; affidavit being jurisdictional basis of proceeding (Pol. Code, § 2185c).

2. Drunkards ⇐2(1)

Affidavit for warrant to arrest one charged with having lost power of self-control through excessive use of intoxicating liquors must state facts or acts of person charged, as well as affiant's opinion, to give superior court jurisdiction of proceeding to commit him to state hospital (Pol.Code, § 2185c).

3. Drunkards ⇐2(1)

Affidavit showing not only affiant's opinion that one for whose arrest warrant was sought had lost power of self-control through excessive use of intoxicating stimulants, but stating that he struck named woman and physically assaulted and threatened to kill affiant, *held* sufficient to give superior court jurisdiction of proceeding for his commitment to state hospital (Pol.Code, § 2185c).

4. Habeas corpus ⇐29

One committed to state hospital on charge of having lost power of self-control through excessive use of intoxicating liquors after hearing by superior court on same day that he was brought before it *held* not entitled to discharge on habeas corpus for failure to award reasonable time to procure witnesses, where order fixing time of hearing recited that he was informed of his rights to make defense, be represented by counsel, and produce witnesses, certified copy of such order was certified to have been served on him by sheriff, and commitment, signed by superior court judge, set forth every fact required by statute (Pol.Code, § 2185c).

5. Drunkards ⇐2(1)

Proceeding to commit to state hospital person charged with having lost power of self-control through excessive use of intoxicating liquors being special proceeding, jurisdictional foundation therefor must appear to have been laid at commencement thereof, so that inquiry is not limited by recitals of commitment showing due and legal proceedings (Pol.Code, § 2185c).

Habeas corpus proceeding by John C. Conmy, also known as John C. Conway, for discharge from the Napa State Hospital.

Writ discharged, and petitioner remanded.

Wesley Rutherford, of Napa, for petitioner.

U. S. Webb, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

By this proceeding the above-named petitioner seeks his discharge on habeas corpus from the Napa State Hospital to which he had been committed on a charge of excessive use of intoxicating liquors to such an extent that he had lost the power of self-control. Based upon the provisions of section 2185c of the Political Code, the petitioner, on the 19th day of February, 1937, was committed to the institution just named for a period of six months as a person coming within the provisions of this section.

[1] The chief contention of the petitioner upon the hearing of this matter was, and in the brief filed by his counsel is, that the warrant of arrest, by which he was brought before the superior court of the county of Marin upon the charge of being a person who had lost the power of self-control through the excessive use of intoxicating liquors, was defective in this, that the warrant of arrest appeared not to have been signed by the magistrate issuing the same.

While it is provided in section 2185c, supra, that the affidavit filed before the magistrate, and also the warrant issued by the magistrate, shall be served upon the person named therein, the fact that the warrant was defective does not affect the jurisdiction of the superior court to hear and determine whether the facts set forth in the affidavit are true and correct, and whether the condition of the person charged as being an inebriate and of having lost the power of self-control is such as to warrant his commitment to a state hospital for the purposes of improving his condition or effecting a cure.

The petitioner's contention as to the defectiveness of the warrant, and as to what we have just stated in relation to its non-effect upon the jurisdiction of the superior court, is fully answered in the opinion of the court in the Matter of In re Kaster, 52 Cal.App. 454, 198 P. 1029. It is there shown that though an officer may be liable for false arrest in the execution of a defective warrant, the fact of the arrest and the bringing of the person before the superior court for hearing and determination is not affected by reason of any defect in the warrant.

[2] The affidavit upon which the warrant of arrest is to be based has been held by the courts of this state to be the jurisdictional basis upon which the proceedings must either stand or fall. In the Matter of In re Crowley, 95 Cal.App. 219, 272 P. 787, the jurisdictional requirements of the affidavit, and also as to what constituted the jurisdictional basis of the proceedings is fully considered. The cases are collected which show that the affidavit, in addition to expressing the opinion of the affiant, must

set forth facts or acts of the person charged with want of self-control.

[3] In the proceedings now under consideration, an examination of the affidavit filed by the wife of the petitioner shows not only the opinion of the affiant that John C. Conmy (otherwise known as John C. Conway), had lost the power of self-control by reason of the excessive use of intoxicating stimulants, but sets forth in addition thereto his acts in striking, or what we might say, physically assaulting one Mrs. Fred Lhumann, and also the physical assault of the petitioner upon the affiant, in that he did strike and beat her and threaten to kill her (the affiant). These are specific acts which tended to show, and from which a reasonable inference might be drawn or conclusion reached, that the power of self-control had been lost.

We may here add that the petitioner's affidavit in this proceeding, if it contains a correct recital of what appeared to him to have taken place at the time of his hearing, demonstrates beyond question that the petitioner was then and there laboring under an exceedingly confused mental condition by reason either of the excessive use of intoxicating liquors or the use of some form of narcotics, all of which gave to the superior court an ocular demonstration of the wisdom and justness of ordering the commitment of the petitioner.

[4] The record shows that the hearing of the petitioner was had on the same day of his being brought before the superior court for a hearing, and the allegation was made that no reasonable time was awarded for the procuring of witnesses, etc. No facts are shown in the petition to substantiate this charge.

The same contention is made in the cases of In re Lewis, 11 Cal.App. 530, 105 P. 774, and In the Matter of the Application of O'Conner, for a writ of habeas corpus, 29 Cal.App. 225, 155 P. 115. In both of these cases the hearing was had a few hours after the arrest of the petitioners, and in both cases the court held the time of the hearing was a matter vested in the discretion of the trial court, and, unless it appeared that there had been an abuse of such discretion, no advantage could be taken thereof.

In the Lewis Case, supra, it was held that the attack by habeas corpus was a collateral proceeding, and if the commitment shows upon its face that all of the statutory requirements essential to a legal arrest, hearing, and commitment were observed, and that it could not be said from the commitment that a reasonable opportunity to produce witnesses was not given, the writ would be discharged.

In the O'Conner Case the petitioner was charged with the condition of inebriety, just as here, and the hearing was held a few hours after the accused was brought before the judge, and it was shown that he was then informed as to his rights guaranteed by the statute, and unless it appeared that an abuse of discretion had been had, the matter of the time of the hearing, etc., rested with the judge of the superior court.

The order of the judge of the superior court, fixing the time of the hearing, recites that the petitioner was arrested and brought before him on a charge of the excessive use of intoxicating liquors, etc., and the court then fixed 2 o'clock of the 19th day of February, 1937, as the time for his hearing. The order also recites that the petitioner was informed of his rights to make a defense to the charge and to be represented by counsel, and, also, to produce witnesses on his behalf. It was further ordered that a certified copy of such order be served upon the petitioner. This is certified to have been served upon the petitioner by the sheriff of the county of Marin.

We do not need to follow the certificate of the medical examiners who certified to the excessive use of intoxicating liquors by the petitioner and of his homicidal tendencies, but will confine ourselves to an examination of the commitment.

The commitment, signed by the judge of the superior court of Marin county, sets forth the fact of the petitioner having been brought before the court for examination upon an affidavit charging him with the excessive use of intoxicating liquor, etc., and then sets forth the fact that the petitioner was advised of his right to be represented by counsel and to produce witnesses, and of his right to have subpoenas issued to compel witnesses to appear in his behalf. The commitment also shows that the petitioner waived the right to be represented by counsel, and the court then and there proceeded with the examination of Lois Conway, the wife of the petitioner and the affiant in the affidavit hereinbefore mentioned, and, after hearing the evidence, decided that the petitioner was addicted to the excessive use of intoxicating liquors; that the certificate of the medical examiners was true; and that the petitioner should be committed to the

state hospital at Napa for the period of six months; that there was reasonable grounds for believing that the petitioner would be permanently benefited by the treatment then and there to be had. Every fact required by the provisions of section 2185c, supra, to be set forth in the commitment, appears to be substantially inserted therein preceding the signature of the judge of the trial court.

[5] The respondent calls attention to the cases of Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742, and In re Hallinan, 126 Cal.App. 121, 14 P.(2d) 797, to the effect that we cannot go behind the commitment, as everything required to be done will be presumed to have been done properly, unless the contrary appears therein, and, if the recitals of the commitment show due and legal proceedings, that is the extent of the inquiry. This being a special proceeding, however, what the court said in the case of In re Crowley, supra, applies, and it must appear that the jurisdictional foundations were laid at the commencement of the proceeding. This having been done in the instant case, and the commitment being all that the law requires, it must follow that the writ issued herein be discharged and the petitioner remanded. And it is so ordered.

We concur: PULLEN, P. J.; THOMPSON, J.



20 Cal.App.2d 705

JENSSEN v. R. K. O. STUDIOS, Inc., et al.

Civ. 5790.

District Court of Appeal, Third District, California.

May 7, 1937.

1. Appeal and error ⇐840(4)

Sufficiency of original pleadings, on which plaintiff moved for judgment, *held* not involved on appeal from judgment for defendants, who filed amended answers, as permitted by trial court; error, if any, being in court's action on application to amend, not denial of motion for judgment.

2. Pleading ⇐236(1)

Permission of or refusal to permit amendments to pleadings is within trial court's sound discretion, which should be liberally exercised.

3. Appeal and error ⇐959(1)

Trial court's exercise of discretion in permitting or refusing to permit amendments to pleadings will rarely be revised by appellate court, and then only for gross abuse clearly appearing.

4. Pleading ⇐290(3)

Original answers, insufficiently verified, failed to deny, and hence admitted, allegations of complaint.

5. Pleading ⇐290(3), 422

Insufficient verification of original answers amounted to no more than defect in pleading, as proper verification is not jurisdictional requirement, but may be waived.

6. Pleading ⇐238(1)

Amendment of pleadings may properly be allowed at time of trial, in absence of showing of prejudice to adverse party.

7. Pleading ⇐258(1)

Granting of permission to amend original answers by changing form of verification *held* proper after lapse of some 16 months between filing thereof and making of first objection to their sufficiency in form.

8. Appeal and error ⇐1032(1)

Burden rests on appellant to show wherein she suffered prejudice by trial court's action in permitting appellees to file amended answers in appellant's suit, even if erroneous.

9. Appeal and error ⇐1026

Harmless error must be disregarded by appellate court.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Carla Jenssen against the R. K. O. Studios, Inc., and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

George Appell and Gretchen Wellman, both of Los Angeles, for appellant.

Ross R. Hastings, John A. Clark, and Mitchell, Silberberg & Knupp, all of Los Angeles, for respondent.

HELD, Justice pro tem., delivered the opinion of the court.

Defendant and respondent R. K. O. Studios, Inc., is a producer of motion pic-

tures, and defendants and respondents Merian C. Cooper, Jane Murfin, and Albert Shelby Le Vino were in its employ, the former as an executive producer, and the latter two as writers. Plaintiff and appellant alleges that she submitted to the corporate defendant a certain literary composition to enable said defendant to determine whether it desired to acquire the same for use in motion pictures. The complaint alleges also that said defendant retained said composition for about one month and thereupon returned the same to plaintiff, but that in the interval it had made copies thereof, and thereafter produced, sold, and distributed the same. Damages, an accounting, and injunctive relief are sought.

The verified complaint was filed on March 22, 1934, and the answer on May 14, 1934. The action came on for trial on September 23, 1935. At the opening of the trial, and before any evidence was introduced, the plaintiff moved for judgment on the pleadings on the ground that the verifications of the answers were insufficient in form. The defendants urged the legal sufficiency of the verifications, but also requested permission of the court to amend the same. The trial court made no formal ruling on plaintiff's motion for judgment, indicating, however, that the motion would be denied. Defendants were allowed until 5 o'clock of the following afternoon to file properly verified answers. The court immediately proceeded with the trial, and answers were thereafter, and within the time allowed, duly filed. Aside from an elaboration of some of the denials, the amended answers merely changed the form of the verification. No new matter of defense was set up. Plaintiff asked no postponement of the trial. The sufficiency of the amended answers is not questioned. On November 15, 1935, judgment in favor of defendants was entered, and from that judgment plaintiff prosecutes this appeal.

[1] Appellant contends that the trial court erred in denying her motion for judgment on the pleadings, and also in granting leave to defendants to amend their answers.

The court having permitted the filing of amended answers, and the defendants having availed themselves of the permission so granted, the sufficiency of the original pleadings is not involved here. If error was committed, that error was not in the decision on the motion for judgment, but on the action of the court on the application to amend. Matteucci v. Whelan, 123 Cal. 312, 55 P. 990, 69 Am.St.Rep. 60.

[2-7] The permitting or refusing of amendments to pleadings is a matter within the sound discretion of the trial court, which should be liberally exercised. That discretion will rarely be revised, and then only for a gross abuse which must clearly appear. Sweet v. Hamilothoris, 84 Cal. App. 775, 258 P. 652. Conceding the insufficiency of the verifications of the original answers, there existed a failure to deny, and therefore an admission of, the allegations of the complaint. 21 Cal.Jur. 155; Patterson v. Blackburn, 47 Cal.App. 362, 190 P. 483. This amounted to no more than a defect in pleading. Proper verification was not a jurisdictional requirement, and might have been waived. Security Trust & S. Bank v. Fidelity & D. Co., 184 Cal. 173, 193 P. 102. An amendment may be properly allowed at the time of trial in the absence of a showing of prejudice to the adverse party. Angier v. Masterson, 6 Cal. 61; Buell v. Beckwith, 59 Cal. 480. The action of the trial court herein is fully sustained by the decision in Bergerow v. Parker, 4 Cal.App. 169, 87 P. 248. And in view of the fact that some 16 months elapsed between the filing of the original answers and the time that objection was first made to their sufficiency, it would have been error had the trial court refused permission to amend. Chatfield v. Williams, 85 Cal. 518, 24 P. 839.

[8, 9] Appellant fails to show wherein she suffered prejudice by the action of the trial court, even if it be conceded that such action was erroneous. This burden rests upon her. 2 Cal.Jur. p. 1008, § 598; Dam v. Lake Aliso Riding School, 6 Cal.(2d) 395, 57 P.(2d) 1315. In Private Investors, Inc., v. Homestake Mining Co., 16 Cal.App. (2d) 1, 60 P.(2d) 146, 148, the court said: "In this state it is not sufficient merely to show error, but is necessary to further show that the error was sufficiently prejudicial to justify a reversal." Harmless error is to be disregarded. Bamber v. Belprez, 15 Cal.App.(2d) 110, 58 P.(2d) 1325.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

PETERSEN v. PETERSEN et al.

Civ. 1824.

District Court of Appeal, Fourth District, California.

May 6, 1937.

Hearing Denied by Supreme Court July 1, 1937.

1. Appeal and error ⇐1170(9)

In action for death in automobile collision, where it was controverted whether deceased or defendant was driving automobile, instruction authorizing recovery on finding that defendant was guilty of willful misconduct "in driving" automobile *held* not to authorize reversal, although instruction assumed that defendant was driving (St.1931, p. 1693, § 141¾; Const. art. 6, § 4½).

2. Evidence ⇐568(6)

Witness' description of speed of automobile as "terrific" *held* entitled to little weight on issue of willful misconduct within automobile guest statute, especially in view of witness' limited opportunity of estimating speed (St.1931, p. 1693, § 141¾).

3. Automobiles ⇐244(35)

Evidence that head-on collision drove automobile backwards fifteen or more feet authorized conclusion that driver of automobile colliding therewith was proceeding at unsafe speed.

4. Automobiles ⇐181(7)

Excessive speed, standing alone, is not "willful misconduct" authorizing recovery under guest statute, but may furnish element of "willful misconduct" where coupled with other circumstances (St.1931, p. 1693, § 141¾).

[Ed. Note.—For other definitions of "Willful Misconduct," see Words & Phrases.]

5. Automobiles ⇐181(1)

Driving on country road on moonlight night without having headlights illuminated, standing alone, is not "willful misconduct" authorizing recovery under guest statute, but may form one element of "willful misconduct" where combined with other circumstances (St.1931, p. 1693, § 141¾).

6. Automobiles ⇐244(20)

In action against host for death of guest in collision, evidence as to excessive speed, driving at night without headlights, driving on wrong side of road, and driving squarely into front of visible on-coming automobile seen by host *held* sufficient to show willful misconduct authorizing recovery (St.1931, p. 1693, § 141¾).

7. Automobiles ⇐181(1)

"Willful misconduct," within guest statute, is intentionally doing something in operation of motor vehicle which should not be done or intentionally failing to do something which should be done under circumstances disclosing knowledge, express or to be implied, that injury to guest will be probable result (St.1931, p. 1693, § 141¾).

Appeal from Superior Court, Fresno County; Stanley Murray, Judge.

Action by E. M. Petersen against Paul Petersen and another. From a judgment against him, named defendant appeals.

Affirmed.

Chester O. Hansen, of Fresno, for appellant.

Rae B. Carter and Edmond A. Chevalier, both of Fresno, for respondent.

Conley, Conley & Conley, of Fresno, for defendant Carl DeBrum.

MARKS, Justice.

Plaintiff, the father of Earl Petersen, deceased, recovered judgment in the sum of $3,500 against Paul Petersen for damages suffered by reason of the death of Earl in an automobile collision which occurred at about 11:30 o'clock p. m., June 18, 1935, on Mountain View avenue in Fresno county.

Earl and Paul were not related. They lived together in a house about 4 miles easterly from the city of Selma in Fresno county. Appellant, Paul Petersen, owned a 1931 model A Ford roadster. At about 11 o'clock p. m. on June 18th the two young men saw a fire burning at a considerable distance to the west of their home and decided to go to it in appellant's automobile. They started, with Earl (deceased) driving, and proceeded westerly to State Highway No. 99, on which they turned northerly and proceeded a distance of not more than half a mile. Their course up to this point is established by the undisputed testimony of appellant. The evidence next shows this automobile in collision with a Chevrolet standard coupé at a point on Mountain View avenue about ½ mile east of Highway No. 99.

Appellant testified that he suffered complete amnesia; that from the time and place where the deceased, Earl Petersen, was driving the Ford, with its headlights illuminated, northerly on Highway No. 99, he remembered nothing until he recovered consciousness in a hospital after the accident. His counsel suggests he suffered "traumatic amnesia" which covered a space of time preceding the accident and for some time after it had happened.

It is assumed by counsel, and probably correctly, that the Ford was driven northerly on Highway No. 99 to the intersection with Mountain View avenue; that it was turned east on Mountain View avenue on which street it proceeded to the place of the collision.

Mountain View avenue had an oiled surface in its center about 12 feet wide. At the place of the collision its shoulders were soft, having been used as turning spaces by farmers of adjacent lands. In turning from Highway No. 99 onto Mountain View avenue, a traveler would first cross the Southern Pacific Company's right of way. In proceeding east, he would ascend a grade, described by the witnesses as a hill. From the crest of this hill the roadway descends for about 150 feet. The grade from the east end of this slope, west to its crest, is about 8 per cent.

The only eyewitness of the collision who testified at the trial was Carl DeBrum, the driver of the Chevrolet coupé involved in the collision. He testified that the night was clear with the moon shining; that he was proceeding westerly on Mountain View avenue at a speed of from 35 to 40 miles per hour with his car principally on his own right-hand side of the road; that the headlights of the Chevrolet were illuminated and in good working order; that when he reached the foot of the grade he suddenly saw some object on the road in front of him which he first thought was an animal, probably a horse; that instantaneously thereafter the collision occurred; that the two automobiles came together head-on; that the gasoline in the fuel tank situated under the cowl of the Ford immediately burst into flames; that he saw the driver of the Ford rise up behind the steering wheel on its left-hand side and fall out of the door on the left or northerly side of the car; that he called out to this man to get away from the fire and that the man crawled to the northerly side of the road towards a vineyard; that he himself crawled east beyond his Chevrolet to escape from the fire; that within a short time two men and a woman come to the scene of the accident and carried him into an alfalfa field on the south side of the road; that he told them of the man who had fallen from the Ford and had crawled towards the vineyard. DeBrum was positive that none of the lights of the Ford were illuminated.

Two of the three persons mentioned in the testimony of DeBrum testified at the trial. They were attracted to the scene of accident by the light of the flames from the burning gasoline shooting high in the air. They found DeBrum and carried him into the alfalfa field. They also found appellant, Paul Petersen, lying on the ground in the vineyard on the north side of the road about opposite the left door of the Ford, inside of which its driver would have been sitting. They carried him further into the vineyard to get him away from the heat. One of them testified that appellant, in reply to the question, "Couldn't you see that fellow coming?" said, "Yes, but I had no lights." Both these witnesses testified that between 10 and 15 feet to the rear of the Ford there was a large pool of fresh cylinder oil near the center of the road, around which were broken parts of the Ford; that a Chevrolet hub cap was on the road about 5 feet to the rear of the Ford. The Chevrolet lost its front hub caps in the collision.

The two men saw a human hand projecting above the center portion of the left half of the seat of the Ford. They approached the Ford and saw the body of deceased in it. His hips were on the right half of the seat with his body slumped to its left so that his head, shoulders, one arm and the hand were behind the steering wheel with his legs extended to the extreme right front of the floor boards of the car. Deceased was either killed in the collision or was burned to death in the fire.

Deceased was a guest of appellant and the judgment can only be sustained upon proof of appellant's willful misconduct. Section 141¾, California Vehicle Act (as amended by St.1931, p. 1693); Meek v. Fowler, 3 Cal.(2d) 420, 45 P.(2d) 194, 197.

Appellant urges two grounds for reversal of the judgment; first, that one of the instructions given by the trial judge was prejudicially erroneous; and, second, that there was no proof of willful misconduct on his part.

[1] The challenged instruction is as follows:

"You are instructed that if you should find that Paul Petersen was guilty of willful misconduct in the driving of his automobile which proximately contributed to the collision, and that the defendant, Carl DeBrum, was not negligent in the driving of his automobile, then it will be your duty to find for the plaintiff against the defendant, Paul Petersen, and in favor of the defendant, Carl DeBrum. On the other hand, you are instructed that if you should find that Carl DeBrum was guilty of negligence in the driving of his automobile, which proximately contributed to the collision, and that Paul Petersen was not guilty of willful misconduct in the driving of his automobile, then it will be your duty to find for the plaintiff against the defendant driver, Carl DeBrum, and in favor of the defendant driver, Paul Petersen. If, however, on the other hand, you should find that the defendant driver, Paul Petersen, was guilty of willful misconduct in the driving of his automobile, which proximately contributed to the collision, and that the other defendant, Carl DeBrum, was also guilty of negligence in the driving of his automobile which proximately contributed to the collision, then it will be your duty to find for the plaintiff and against the two defendant drivers, Paul Petersen and Carl DeBrum."

Appellant argues that in this instruction the trial court, in effect, informed the jury that he was in fact driving the Ford at the time of the collision. This was one of the controverted facts in the case. Appellant maintained at the trial, and still maintains here, that deceased was driving the Ford at the time of the collision. The only evidence supporting this argument is that of appellant himself, to the effect that deceased was driving up to the time of appellant's period of amnesia; and that appellant had a scar on his chest of the shape and size of a rear view mirror which was attached to the right of the center of the dash of the Ford where it joined the windshield. The wound causing this scar was received in the collision.

Opposed to the foregoing evidence is the positive testimony of DeBrum that appellant was driving the Ford; that he saw him rise up behind the steering wheel at the impact and fall through the left door of the car to the road. There is also the undisputed evidence of two witnesses that appellant was found lying in the vineyard opposite the left door of the Ford. Further, there is the evidence of the position of the body of deceased clearly indicating that he was occupying the passenger's seat and not the driver's. It would seem impossible for the force of the collision to have instantaneously shifted the positions of the two men in the small space of the Ford roadster so that at the instant following the impact the driver would be occupying the passenger's seat and the passenger would be occupying the driver's seat. Such a shift, had it occurred, would have been seen by DeBrum for it is obvious that one body would have had to have passed over the other, and DeBrum saw no such movement.

If this state of the record shows a conflict in the evidence on the question of who was driving the Ford, the challenged instruction should not have been given, as it assumed that appellant was driving the car. However, if the words, "if he were driving," had been inserted in the instruction in each place where the assumptions were made, it is difficult to understand how the jury could have reached any conclusion other than that appellant was driving at the time of the collision. Under the facts before us, the error in the instruction, if any, was not sufficiently prejudicial to permit us to reverse the judgment were we inclined to do so. Section 4½, art. 6, Const.

Appellant seriously maintains that there is no proof of willful misconduct on his part. He argues that there is no evidence to prove excessive speed and that the fact of the Ford having no lights illuminated, in itself is not sufficient to establish anything more than negligence or at most gross negligence.

[2-4] There is no evidence from which the exact speed of the Ford may be determined. At one place in his evidence DeBrum, in referring to the Ford, used the expression, "at the terrific speed it was coming." This can be considered little more than an expression of an opinion by the witness [McKinley v. Dalton, 128 Cal. App. 298, 17 P.(2d) 160], and little importance can be attached to it especially in view of his limited opportunity to estimate the speed of the Ford. From the physical facts in evidence supporting the conclusion that the collision drove the Chevrolet backwards 15 or more feet, the jury could have concluded that appellant was driving at an unsafe rate of speed. Speed in itself and

alone is not sufficient to establish willful misconduct. However, coupled with other circumstances, it may furnish an element of that offense.

[5] We agree with appellant in his argument that, standing alone, the fact of driving on a country road on a moonlight night without headlights illuminated might not be sufficient evidence to establish willful misconduct. It may, however, form one element of that offense. Failure to have lights, when combined with other circumstances, might constitute willful misconduct.

[6, 7] However, speed, lack of lights, and driving on the wrong side of the road are not the only breaches of the rules of safe driving committed by appellant. Mountain View avenue, east of the point of the collision, was straight and unobstructed. The night was clear. The Chevrolet was approaching appellant from the east with headlights illuminated. Appellant admitted that he saw these lights approaching and the evidence justifies the conclusion that he should have seen them when he cleared the crown of the hill at least 150 feet away from the point of impact. Knowing that an automobile was approaching him on a comparatively narrow road, he continued on his course without lights, at a considerable speed, on the wrong side of the road, and drove squarely into the front of the other car so that the two automobiles when they came to rest, as described by one witness, were wheel to wheel and headlight to headlight.

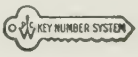
The definition of willful misconduct is now well settled in this state. It is thus defined in Meek v. Fowler, supra:

"It is satisfactorily defined in Turner v. Standard Oil Co., 134 Cal.App. 622, 626, 25 P(2d) 988, 990, wherein it is declared that '"willful misconduct," within the meaning of this statute, may then be defined as intentionally doing something in the operation of a motor vehicle which should not be done or intentionally failing to do something which should be done under circumstances disclosing knowledge, express or to be implied, that an injury to a guest will be a probable result.'"

When we apply this definition to the facts of the instant case, the conclusion follows that appellant was guilty of willful misconduct in the operation of his car. Certainly, driving an automobile head-on into another automobile, which the driver of the first car knows is approaching him, is "intentionally doing something in the operation of a motor vehicle which should not be done." That it was knowingly done may be implied from the facts. The other necessary element of willful misconduct is present in this case, for such an act knowingly and intentionally performed, as here, must have been done under circumstances disclosing to appellant that injury to his guest would be not only a probable but a certain result.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.



24 Cal.App.2d Supp. 751

HARPER v. CARPENTER.

Civ. A 3604.

Appellate Department, Superior Court, Los Angeles County. California.

April 29, 1937.

1. Divorce ⇐331

In former wife's suit to recover from deceased husband's estate unpaid installments of alimony due under Nevada divorce decree, pleadings in Nevada action would be presumed to be sufficient to justify provisions of decree and to make them effective.

2. Divorce ⇐331

Former wife of deceased husband could recover from husband's estate unpaid installments of alimony due under Nevada divorce decree incorporating into the decree a property settlement agreement in so far as agreement related to payment of alimony, where agreement provided that it should be made a part of any divorce decree as a complete and final adjudication of matters contained in agreement until further orders of court.

3. Divorce ⇐238

Under statute, husband who is granted divorce for offense of wife cannot be required to pay alimony or support money to wife, except where husband and wife have made property settlement agreement which they have provided should be incorporated in judgment (Civ.Code, § 139).

4. Divorce ⇐331

Nevada divorce decree awarding alimony to wife to extent of property settlement

agreement, which parties provided should be incorporated in decree, warranted wife's recovery from deceased husband's estate of unpaid alimony installments, notwithstanding that divorce was granted to husband for fault of wife, in absence of Nevada statute or decision limiting alimony to innocent wife (Comp.Laws Nev. §§ 9463, 9465).

Appeal from Municipal Court of Los Angeles, Los Angeles County; Frank G. Tyrrell, Judge.

Action on a creditor's claim by Annie Harper against Helen Carpenter, executrix of the estate of Thomas Harper, deceased. From a judgment for plaintiff, the defendant appeals.

Affirmed.

J. Paul Elliott and E. A. Kline, both of Los Angeles, for appellant.

H. Sidney Laughlin, of Los Angeles, for respondent.

SHAW, Presiding Judge.

This is an action against the defendant in her representative capacity on a creditor's claim against the estate of which she is executrix. The complaint on which the case was tried alleged in brief that the defendant's testator was formerly the husband of the plaintiff; that prior to his death he obtained a divorce from the plaintiff in Nevada; that before the divorce decree was made the plaintiff and the testator entered into a property settlement agreement by which the testator agreed to make payments of $75 per month to the plaintiff; that the divorce decree also required the testator to make the same monthly payments to the plaintiff, and that a number of those payments were due and unpaid, recovery of which was sought. The complaint contained two counts, the first of which was based entirely on the divorce decree, and the second on the agreement. A demurrer to the second count was sustained in the trial court, and the case went to trial and judgment was rendered for plaintiff on the first count only, from which the defendant appeals. At the trial both the Nevada judgment and the property settlement agreement were placed in evidence, and it was stipulated that the monthly payments sued for were unpaid, and were due according to the terms of the agreement.

The property settlement agreement, after reciting the desire of the husband to make provision for the support of the wife and the desire of both parties to adjust their community property, making a division of certain property between them, and stating an agreement by the husband to pay the wife $75 per month, declares that "this agreement may be used and plead [sic] by either party in any divorce action which either may bring against the other and must be made a part of any divorce decree as a complete and final adjudication of the matters contained herein until the further order of the court." The judgment of divorce obtained by the husband in Nevada, on which this action by the former wife is based, finds that this agreement was made by the parties, states the legal effect of its provisions in full without copying them, including that for payment of $75 per month to plaintiff here, and declares "that said agreement should be and the same is hereby ratified and confirmed and made a part of the decree of this court." The judgment contains also this provision: "It is further ordered and decreed that the property settlement between the parties hereto [identifying it] be filed in this action and the same be and it hereby is incorporated in and made a part of this decree in so far as the same relates to the property settlement between the parties hereto and the alimony of $75.-00 per month therein provided for."

[1, 2] Plaintiff brings this action on this judgment to recover unpaid installments of the alimony thus mentioned, on the theory that the judgment awards to her these sums to be paid by her former husband. Defendant contends that no such provision is to be found in the judgment, the important parts of which we have above stated or quoted. Plaintiff's contention in this respect must be sustained. While the judgment does not in so many words provide for the making of these monthly payments, it does so by necessary implication from what is stated therein. The case is substantially the same as Tripp v. Superior Court (1923) 61 Cal.App. 64, 67, 214 P. 252, 253. There the interlocutory judgment of divorce, after setting forth in full the property settlement agreement, which provided (as here) that it should be approved by the court and embodied in the decree, went on to order that the plaintiff "take all of the community property as set forth in said property settlement and agreement as aforesaid."

One of the terms of the agreement was that the husband should pay certain debts which were charged against the property given the wife. Holding that this judgment contained an order for payment, on which the husband could be held in contempt for nonpayment, the court said: "It is true that neither of the decrees contained such an order in express terms, but we are nevertheless of the opinion that petitioner's contention cannot be upheld. The agreement recited the fact that a divorce action was pending between the parties, and contained a formal stipulation that it should be subject to the approval of the court and that, when so approved, it should be embodied in the decree, in the divorce action. This stipulation surely contemplated that the terms of the agreement, when it should be embodied in the decree, should have the compelling power of the court behind its every covenant. * * * We are convinced that the terms of the agreement, except in so far as they were executed either before or at the time of the interlocutory decree, became enforceable as mandates of the court." This case was approved and followed in Ex parte Weiler (1930) 106 Cal.App. 485, 488, 289 P. 645. Tripp v. Superior Court has been distinguished for various reasons and therefore not followed in Andrews v. Superior Court (1930) 103 Cal.App. 360, 365, 284 P. 494, Schnerr v. Schnerr (1932) 128 Cal.App. 363, 367, 17 P.(2d) 749, and Baxter v. Baxter (1935) 3 Cal.App.(2d) 676, 685, 40 P.(2d) 536. De Haven v. Superior Court (1931) 114 Cal.App. 253, 300 P. 95, on which defendant relies, does not actually hold anything on this point. The ground of distinction of the cases is thus stated in Baxter v. Baxter, supra, 3 Cal. App.(2d) 676, at page 682, 40 P.(2d) 536, 539: "Where a property settlement agreement contains a provision that it shall not go into effect until it is approved by the court, and is therefore rather in the nature of a stipulation of the parties than a final agreement, and the complaint in a divorce action contains the proper allegations and prayer looking toward the settlement of the property rights of the parties, an order of the court that the terms of the contract be carried out will be implied from the incorporation of the agreement in the decree, either bodily or by reference. [Citing the Tripp and Weiler Cases.] But if the agreement is complete in itself, without reference to action by the court, and the plaintiff does not ask for a property settlement, the court does not, by merely approving the settlement or even by incorporating it in the decree, order the performance of the contract. [Citing the Andrews, Schnerr and De Haven Cases.]"

Accepting this as a proper ground of distinction, it is obvious that the agreement in the case at bar is not "complete in itself, without reference to action by the court," for it provides that it "must be made a part of any divorce decree as a complete and final adjudication of the matters contained herein until the further orders of the court." The pleadings in the Nevada action are not before us, but we must presume that they are sufficient to justify the provisions of the judgment and make them effective. The judgment here goes farther than merely to declare the agreement a part of the decree, without setting forth its terms, and on this ground also the present case is distinguishable from some of those above cited. The judgment here sets forth fully the husband's agreement to pay plaintiff $75 per month and then provides that the agreement is "incorporated in and made a part of this decree in so far as the same relates to * * * the alimony of $75.00 per month therein provided for." We have no difficulty in seeing here such a judgment for the recovery of the payments of $75 per month provided in the agreement and recited in the judgment as will support an action on the judgment to recover those payments. Whether a contempt charge could be based on failure to make them we need not and do not decide.

[3, 4] It appears here that a divorce was granted to the husband for some fault of the wife, the nature of which is not stated, and defendant contends that for this reason the court had no power to grant permanent alimony to the wife. In California it is unquestionably the rule that when a divorce is granted to the husband for an offense of the wife, the court has no power to require the husband thereafter to pay alimony or support money to his former wife. Everett v. Everett (1877) 52 Cal. 383; Ex parte Spencer (1890) 83 Cal. 460, 464, 23 P. 395, 17 Am.St.Rep. 266; Lampson v. Lampson (1915) 171 Cal. 332, 153 P. 238; McKannay v. McKannay (1924) 68 Cal.App. 701, 705, 230 P. 214; In re McKenna (1931) 116 Cal.App. 232, 2 P.(2d) 429; Schluter v. Schluter (1933) 130 Cal.App. 780, 785, 20 P.(2d) 723; Marrs v. Superior Court (1934) 137 Cal.

App. 579, 581, 30 P.(2d) 1030; Gaudio v. Gaudio (1934) 138 Cal.App. 289, 32 P.(2d) 156. These decisions are based on our statutory provisions, section 139 of the Civil Code authorizing orders for the support of the wife after divorce being limited to cases "where a divorce is granted for an offense of the husband," and there being no provision for permanent alimony in any other case. But to this rule there is an exception in California where husband and wife have made a property settlement agreement and provided that it may be incorporated in the judgment of the court. In such a case the judgment of divorce may properly provide, even where the divorce is granted to the husband, that he shall make such payments to the wife as are called for by the agreement. The judgment in such a case is altogether independent of statute and rests upon the contract for support, but is, nevertheless, valid. Hogarty v. Hogarty (1922) 188 Cal. 625, 206 P. 79; Parker v. Parker (1921) 55 Cal.App. 458, 203 P. 420; Johnson v. Johnson (1930) 104 Cal.App. 283, 287, 285 P. 902; Johnson v. Superior Court (1933) 128 Cal.App. 584, 586, 17 P.(2d) 1055; see, also, Marrs v. Superior Court, supra; Gaudio v. Gaudio, supra. The parties have not cited, and after some research we have not found, any Nevada decision on the power of the court in a divorce action to require a husband who obtains a divorce from his wife to make payments for her future support. The general California rule above stated appears to prevail in many other states, in the absence of statute to the contrary. 19 Corpus Juris, 244. The statutes of Nevada appear to contain no express provision covering the subject. There is no provision such as our Civil Code, § 139, limiting the wife's permanent alimony to cases where she obtains the divorce. Section 9463, Nevada Compiled Laws of 1929 (Hillyer), seems to authorize such awards of property "as shall appear just and equitable," and section 9465 of the same compilation authorizes the court to set apart such property for the wife's support "as shall be deemed just and equitable," apparently without limitation to cases where the wife obtains the divorce. These statutory provisions favor, rather than prevent, the operation in Nevada of the exception declared by the California cases last cited, which permits a monetary award against an innocent husband to the extent of any agreement the parties have made therefor. In the absence of any Nevada decision to the contrary, we regard the exception as operative there, and this judgment as valid.

The judgment is affirmed, respondent to recover her costs of appeal.

I concur: SCHAUER, J.



23 Cal.App.2d Supp. 758

WADE v. RATHBUN.

C. A. 3636.

Appellate Department, Superior Court, Los Angeles County, California.

April 28, 1937.

1. Exemptions ⇐36

Where it is necessary to measure value in money, "value" can be only that called "value in exchange" or "market value," which is not what a property owner could realize at a forced sale, but price he could obtain after reasonable and ample time, such as would ordinarily be taken by an owner to make a sale of like property.

[Ed. Note.—For other definitions of "Market Value" and "Value," see Words & Phrases.]

2. Exemptions ⇐4

Rule that exemption statutes should be liberally construed so as to carry out Legislature's intention and humane purpose should not go to extent of doing violence to terms of statutes.

3. Exemptions ⇐4

No property is exempt unless made so by express provision of law, and legislators are presumed to understand force of language used in exemption statutes and to have contemplated all circumstances which would make it desirable that other property not in lists of exemptions should be added thereto.

4. Statutes ⇐188

Meaning of statute is to be determined so far as possible from its language.

5. Exemptions ⇐44

Automobile which had forced sale value of $50 and "retail value" of $120, as amount which persons who were buying such automobiles for their own use were paying in the

open market, *held* not exempt from execution under statute exempting one motor vehicle of value not exceeding $100, since word "value" as used in statute does not mean forced sale value but means "market value" (Code Civ.Proc. § 690.24, as added by St.1935, p. 1971).

Appeal from Municipal Court of Los Angeles, Los Angeles County; May D. Lahey, Judge.

Action by Edna Wade against D. S. Rathbun. There was judgment for plaintiff, and an automobile belonging to defendant was seized on execution, and from an order denying a claim of exemption filed by defendant, defendant appeals.

Affirmed.

D. P. Covert, of Glendale, for appellant.

C. H. Hasbrouck, of Glendale, for respondent.

SHAW, Presiding Judge.

Upon a judgment against defendant in the municipal court an automobile belonging to him was seized on execution, whereupon he claimed the automobile as exempt under the provisions of section 690.24 of the Code of Civil Procedure (as added by St. 1935, p. 1971) alleging that its value was less than $100. The court, after a hearing, made an order declaring that the automobile was not exempt, from which defendant appeals.

The code section above referred to exempts from execution "one motor vehicle of a value not exceeding one hundred dollars." At the hearing on defendant's claim it was stipulated that "the wholesale value of said automobile, that is, the amount which said automobile would bring in the open market upon a forced sale, and the amount which used car dealers were regularly paying at that time for automobiles of like kind and condition was the sum of $50.00"; and further that "the retail value, that is, the amount which persons who were buying such automobiles for their own use were paying in the open market, was the sum of $120.00." The trial court adopted the second of these two figures as the value of the automobile, whereas defendant contends that the first, or wholesale (forced sale) value should have been accepted, and this is the only point raised on this appeal.

Several of the sections of the Code of Civil Procedure relating to exemptions from execution provide for exemptions dependent upon the value of the property claimed (see sections 690.1, 690.3, 690.6, 690.8, 690.9, 690.12, 690.17, 690.18, 690.21 [as added by St.1935, p. 1966 et seq.], and section 690.24 above quoted [as added by St. 1935, p. 1971]), but nowhere in the legislation on this subject is there any definition of the word "value" as used therein, or any provision as to the matters to be considered in determining value. The question before us has not been considered in any California decision, as far as we are aware, but the word "value," when not qualified by context or circumstances, has often been defined as meaning "market value," which is not what the owner could realize at a forced sale, but the price he could obtain after reasonable and ample time, such as would ordinarily be taken by an owner to make a sale of like property. San Diego Land, etc., Co. v. Neale (1888) 78 Cal. 63, 68, 20 P. 372, 3 L.R.A. 83 (an eminent domain case); Santa Ana v. Harlin (1893) 99 Cal. 538, 542, 34 P. 224 (also an eminent domain case); Wickersham Co. v. Nichols (1913) 22 Cal.App. 731, 733, 136 P. 511 (word used in a bond); Dean v. Hawes (1916) 29 Cal.App. 689, 693, 157 P. 558 (word used in a finding); Continental Rubber Works v. Bernson (1928) 91 Cal.App. 636, 638, 267 P. 553 (value of goods sold); Bunnell v. Baker (1930) 104 Cal.App. 313, 317, 285 P. 877, 286 P. 1090 (word used in an instruction); Yellen v. Fidelity, etc., Co. of N. Y. (1931) 115 Cal.App. 434, 441, 1 P. (2d) 1019 (word used in a finding); Joint Highway Dist. v. R. R. Co. (1933) 128 Cal. App. 743, 753-756, 18 P.(2d) 413 (another eminent domain case). In addition to the cases cited, see 66 Corpus Juris 418–420.

[1] In some connections, as appears from Corpus Juris and from the discussion in Joint Highway Dist. v. R. R. Co., supra, the word "value" may express the utility of an object, which is sometimes called the "value in use"; but obviously this meaning cannot be applied to a case, such as we have here, where it is necessary to measure the value in money. In such a case, value can be only that called "value in exchange." The latter is market value, as already defined. Joint Highway Dist. v. R. R. Co., supra, 128 Cal.App. 743, at page 753, 18 P.(2d) 413; Corpus Juris, loc.cit.

[2-5] To avert the application of this last-mentioned definition of "value" to the statute in question, defendant refers to the well-known rule that exemptions from execution should be liberally construed so

as to carry out the intention of the Legislature and the humane purpose designed by the lawmaker. Holmes v. Marshall (1905) 145 Cal. 777, 779, 79 P. 534, 9 L.R.A. 67, 104 Am.St.Rep. 86, 2 Ann.Cas. 88; 12 Cal.Jur. 332. But such liberality of construction should not go to the extent of doing violence to the terms of the statute. Conlin v. Traeger (1927) 84 Cal.App. 730, 734, 258 P. 433. "No property is exempt unless made so by express provision of law. * * * Legislators are presumed to understand the force and effect of the language which is used, and to have contemplated all circumstances which would make it desirable that other property not in the lists of exemptions should be added thereto." Estate of Brown (1899) 123 Cal. 399, 401, 55 P. 1055, 69 Am.St.Rep. 74. The meaning of a statute is to be determined so far as possible from its language. 23 Cal.Jur. 730. If the word "value" used in the statute here had two accepted meanings, one of which was that for which defendant contends, then by the rule of liberal construction we might adopt defendant's construction of it. See Estate of Brown, supra, 123 Cal. 399, at page 402, 55 P. 1055, 69 Am.St.Rep. 74. But, as appears from the authorities above cited, the meaning contended for by defendant, that is, the price which can be realized at a forced sale, is never given to the word by legal construction. The trial court correctly construed the statute. If any change in the rule be thought desirable, it should be sought from the Legislature rather than from the courts.

The order appealed from is affirmed, respondent to recover her costs of appeal.

SCHAUER, J., concurs.



23 Cal.App.2d Supp. 761

PEOPLE v. MOLINARI.

Cr. A. 1386.

Appellate Department, Superior Court, Los Angeles County, California.

April 29, 1937.

1. Criminal law ⇐576(11), 968(3)

Violation of accused's constitutional right to speedy trial does not furnish ground for arrest of judgment, but can be reached by objection to further delay of trial and motion to dismiss complaint (Pen.Code, § 1452; § 1382, as amended by St.1935, p. 1468; Const. art. 1, § 13).

2. Criminal law ⇐251

Statute requiring misdemeanor case in justice's court to be brought to trial within 30 days *held* inapplicable to misdemeanor proceedings in municipal court, although Penal Code provides that procedure to be followed in misdemeanor cases filed in municipal court shall be same as that provided for proceedings in justices' courts by specified sections, in view of fact that statute was not included in specified sections and of principle expressio unius est exclusio alterius (Pen.Code, § 1382, subd. 3, as amended by St.1935, p. 1468; § 1461a, as amended by St.1935, p. 2181).

3. Criminal law ⇐576(1)

Where case comes within statute defining maximum periods beyond which, in absence of proper excuse, trial is not speedy, court is bound, upon accused's application, to dismiss proceeding unless good cause to contrary is shown, but is equally bound to dismiss proceeding upon accused's demand if he has in fact without reasonable ground been denied speedy trial, irrespective of whether statute applies (Pen.Code, § 681a; § 1382, as amended by St.1935, p. 1468; Const. art. 1, § 13).

4. Criminal law ⇐576(5)

Accused's consent to or request for one postponement does not constitute agreement to or request for another postponement (Const. art. 1, § 13).

5. Criminal law ⇐576(5)

Accused's waiver of his constitutional right to speedy trial for period of 14 weeks does not constitute similar waiver covering additional period of nearly seven weeks (Const. art. 1, § 13).

6. Criminal law ⇐576(2)

Postponement of misdemeanor trial for seven weeks, over accused's objection, on city attorney's representation that another prosecution against accused was pending in federal court and that prosecution did not want to interfere with further investigation there being made, *held* improper, notwithstanding accused had obtained prior postponement on ground of pendency of the same federal prosecution (Const. art. 1, § 13).

7. Criminal law ⇐576(2)

"Speedy trial," within constitutional provision entitling accused thereto, means a tri-

al as soon after indictment as prosecution can with reasonable diligence prepare for it (Const. art. 1, § 13).

[Ed. Note.—For other definitions of "Speedy Trial," see Words & Phrases.]

8. Criminal law ⇐576(11)

Evidence *held* to affirmatively establish arbitrary postponement of misdemeanor trial for 48 days, over accused's objection, entitling accused to dismissal of prosecution (Const. art. 1, § 13).

9. Criminal law ⇐576(1)

Arbitrary postponement of misdemeanor trial for 48 days over accused's objection *held* to constitute denial of constitutional right to "speedy trial" (Const. art. 1, § 13).

10. Constitutional law ⇐32

Constitutional provision for speedy trial is self-executing (Const. art. 1, § 13).

Appeal from Municipal Court of City and County of Los Angeles; Harold B. Landreth, Judge.

Ernest Molinari was convicted in the municipal court of the City and County of Los Angeles of violation of Pen.Code, § 311, subd. 3, making it a misdemeanor to print and keep for sale indecent pictures, and he appeals.

Reversed and remanded, with directions.

Ralph D. Paonessa, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Newton J. Kendall, Asst. City Atty., and John L. Bland and Robert H. Patton, Deputy City Attys., all of Los Angeles, for the People.

SCHAUER, Judge.

Defendant appeals from a conviction in the municipal court of violation of subdivision 3, section 311 of the Penal Code, a misdemeanor (printing and keeping for sale indecent pictures), and among other contentions insists that he is entitled to a reversal of the judgment upon the ground that his constitutional right to a speedy trial was violated. The record upholds defendant's contention in this regard.

[1] The complaint was filed on May 12, 1936, and trial was originally set for June 18, 1936, on which date the hearing was postponed to September 30, 1936. Whether this continuance was at the request of the prosecution, as stated in the minutes of the court, according to the certified copy thereof in the file, or upon motion of the defendant as recited in the settled statement on appeal, is immaterial, as in either event it appears from the record that such motion was made "on the ground that prosecution was pending in the Federal Court" and that "at that time the defendant, in open Court, personally waived the statutory time for trial and any objection to the delay." On September 30th when the cause was called for trial defendant answered ready, but the trial court, upon motion of the city attorney and over defendant's objection to any further delay whatsoever, ordered a continuance to November 17, 1936. On that date when the case was called for trial defendant moved to dismiss the complaint because the trial had been postponed more than 30 days (subsequent to September 30th) over his objection, and such motion having been denied and the defendant having been adjudged guilty after a trial by the court, he moved to arrest judgment upon the ground "that the defendant was not brought to a speedy trial and that the cause was continued beyond the thirty day statutory time over the objection of the defendant, in violation of his constitutional rights to a speedy trial," which motion was also denied. While the point involved does not furnish a ground for arrest of judgment (see section 1452, Penal Code), it is properly raised by defendant's above-mentioned objection and motion to dismiss.

[2] Section 13, art. 1 of the Constitution of California, provides that:

"In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy * * * trial" and section 1382 of the Penal Code, as amended by St.1935, p. 1468 directs that "The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed. * * *

"3. If a defendant in a misdemeanor case in a justice's court, whose trial has not been postponed upon his application, is not brought to trial within thirty days after the defendant is arrested and brought within the jurisdiction of the court."

It will be noted that the constitutional provision above quoted is by its terms applicable to criminal prosecutions "in any court whatever," while subdivision 3 of section 1382 of the Penal Code, as amended (subdivisions 1 and 2 are not quoted because they relate exclusively to prose-

cutions over which the municipal court does not have trial jurisdiction) is limited in application to "a misdemeanor case in a justice's court." Our attention has been directed to no provision of law which would make said section 1382 effective upon misdemeanor proceedings in municipal courts. Section 1461a of the Penal Code, as amended by St.1935, p. 2181, provides specifically that: "The procedure to be followed in misdemeanor cases filed in municipal courts, over which such courts have jurisdiction, shall be the same as that provided for in this chapter [chapter 1, tit. 11, pt. 2, Penal Code] for proceedings in justices' and police courts, as specifically provided in sections number 1426 to number 1460, inclusive (except sections 1431 and 1432), in so far as the same may be applicable to such municipal courts." Section 1382, Penal Code, as amended (a part of chapter 8, tit. 10, pt. 2), is obviously not included by the reference of said section 1461a, as amended, and in conformity to the principal expressio unius est exclusio alterius must be deemed inapplicable to proceedings in municipal courts. Defendant therefore must rely solely upon the constitutional provision herein above quoted.

[3] In the case of Harris v. Municipal Court (1930) 209 Cal. 55, at page 62, 285 P. 699, 701, the Supreme Court said: "We have been referred to no statute or case, and we have found none in this state, compelling the dismissal of a misdemeanor charge in a court inferior in jurisdiction to the superior court [subdivision 3 was added to section 1382, Penal Code, in 1931 (St.1931, p. 2479)], but no reason appears to justify a refusal to enforce the self-executing provision of the Constitution in such a case. The Constitution says that in criminal proceedings, *in any court whatever,* the party accused shall have the right to a speedy trial." Section 681a of the Penal Code, which is applicable to criminal proceedings in all courts, declares: "The welfare of the people of the state of California requires that all proceedings in criminal cases shall be heard and determined at the earliest possible time. It shall be the duty of all courts and judicial officers * * * to expedite the hearing and determination of all such cases and proceedings to the greatest degree that is consistent with the ends of justice." Section 1382 of the Penal Code, as amended, is designed to aid in carrying out the mandate of the Constitution by defining maximum periods beyond which (in the absence of proper excuse) a trial is not speedy but in ultimate analysis the right is that declared by the Constitution. If the case comes with the statute (section 1382, Penal Code, as amended), then clearly the court is bound, upon application of the defendant, to dismiss the proceeding "unless good cause to the contrary is shown" but so also is the court equally bound to dismiss the proceeding upon demand of the defendant if he has in fact without reasonable ground been denied a speedy trial irrespective of whether the case does or does not come within the somewhat mechanical operation of said section 1382.

[4-6] While the record before us shows that the defendant expressly consented to (and perhaps requested) the first trial continuance (June 18, 1936, to September 30, 1936), it also shows that he did not consent to any other postponement and that the second continuance (September 30, 1936, to November 17, 1936) was made over his objection. It borders upon supererogation to remark that a defendant merely by consent to or request for one postponement does not thereby agree to or ask for another; likewise his waiver of his constitutional right to a speedy trial for a period of 14 weeks does not amount to a similar waiver covering an additional period of nearly 7 weeks. It appears in the record that the only basis for the second continuance (September 30, 1936, to November 17, 1936) was the "representation of the City Attorney that the case pending in the Federal Court, on which the defendant based his application for a continuance on June 18, 1936, had not yet been tried, and that the prosecution did not want to interfere with the further investigation being made in that case." Such representation of the city attorney, even if it had been competent as evidence, would have afforded no reasonable or legal ground for postponing the trial. The defendant's rights under the Constitution of the State of California to a speedy trial in a court existing by virtue of that Constitution, where such defendant is at all times within the jurisdiction of such state court and available to its process, are neither abrogated nor suspended by the mere pendency in a federal court of another action to which the defendant is a party. The fact that defendant on June 18, 1936, may have given the pendency of such federal prosecution as a reason (good or

bad) for then desiring a postponement is wholly immaterial to the application of the prosecutor on September 30th, as is also the "want" of that officer with respect to the "further investigation being made" and which investigation was not shown to be in anywise dependent upon or likely to be affected by the granting or denying of the proposed postponement.

[7-10] A "speedy trial," it has been held, "means a trial as soon 'after indictment' as the prosecution can with reasonable diligence prepare for it." Harris v. Municipal Court (1930) supra, 209 Cal. 55, 64, 285 P. 699, 702, citing Arrowsmith v. State, 131 Tenn. 480, 175 S.W. 545, L.R.A.1915E, 363, and State v. Sims, 1 Overt. (Tenn.) 253. The record before us contains no hint that the prosecution was not fully prepared for the trial of the defendant as early as June 18, 1936; indeed, the reasonable inference from the entire record is that the prosecution had available at all times subsequent to defendant's arrest on May 9, 1936, all the evidence which was introduced against him and that he could have been tried as conveniently on September 30th as he was on November 17th. Regarding the second continuance of the trial, granted over defendant's objection, it may well be said by us in this case, as was said by the Supreme Court in Harris v. Municipal Court (1930) supra, 209 Cal. 55, at page 64, 285 P. 699, 702, "Here no good or any cause has been shown either in the respondent court or in this court, other than the whim of the prosecution." In short, the record affirmatively establishes that the trial was arbitrarily postponed 48 days over defendant's objection. This was an unnecessary and unreasonable denial of a right granted by a self-executing constitutional provision. Section 13, art. 1, Const. The circumstances are factually dissimilar to those existing in People v. Grace (1928) 88 Cal. App. 222, 263 P. 306, wherein the court was ready to start the trial on June 3, 1927, which date was within the statutory period, but continued it to the first court day thereafter, June 6, 1927, which was beyond that period, because it had not sooner disposed of defendant's motion to dismiss which was made on June 3d. The facts of the case at bar are more similar to those related in Harris v. Municipal Court, supra (1930) 209 Cal. 55, at page 64, 285 P. 699, 702, wherein the Supreme Court declared: "* * * it is not necessary that the party accused affirmatively show prejudice. Prejudice will be presumed from the violation of this constitutional right. It is enough for the defendant to show that the prosecution has been unreasonably delayed. It will not be presumed that good cause for the delay in fact existed. If there was any good cause, it was for the prosecution to show it."

The judgment is reversed, and the cause remanded to the municipal court of the city of Los Angeles, with directions to dismiss the complaint.

I concur: SHAW, P. J.

8 Cal.2d 675

DAVIS v. RITE-LITE SALES CO. et al.

S. F. 15545.

Supreme Court of California.

May 1, 1937.

1. Corporations ⇐80(12)

Stockholder's complaint against corporation and agent, alleging that agent fraudulently induced purchase of stock, and that stock was worthless, offering to restore stock, and praying for amount paid therefor, attempted to state cause of action for rescission of contract of sale, and not for damages.

2. Election of remedies ⇐3(1)

Action for damages is based on affirmance of contract, while action for rescission is based on disaffirmance thereof, and such remedies are mutually inconsistent, although damages may be prayed for in event rescission cannot be had.

3. Fraud ⇐59(2)

Measure of damages in action by defrauded vendee is difference between actual value of property at time of sale and what it would have been worth if representations had been true.

4. Fraud ⇐41

In action for fraud, allegations of fraud must be clear and unequivocal.

5. Pleading ⇐18

Stockholder's complaint alleging that corporate agent induced purchase of stock by representing that corporation held patent on lamp, that agent failed to investigate patent held by another, that interlocutory decree was entered at suit of party claiming under such other patent restraining corporation from selling lamp, and that agent knew lamp was developed by holder of such other patent, *held* demurrable for uncertainty, ambiguity, and unintelligibility.

6. Limitation of actions ⇐179(2)

Where action for fraud is brought more than three years after commission of fraud, facts relating to discovery thereof should be detailed, in order that court may determine whether, with due diligence, fraud should have been discovered sooner, in view of statute imposing limitation of three years after discovery of fraud (Code Civ.Proc. § 338, subd. 4).

7. Limitation of actions ⇐179(2)

In action for fraud brought more than three years after acts of fraud alleged, plaintiff is held to stringent rules of pleading, in view of statute imposing limitation of three years after discovery of fraud (Code Civ.Proc. § 338, subd. 4).

8. Contracts ⇐270(1)

Party wishing to rescind contract must act promptly, either by giving notice of rescission, or, if notice is unnecessary, by filing action as promptly as party would have been required to give notice.

9. Limitation of actions ⇐179(2)

Count of complaint filed November 1, 1934, alleging acts of fraud and facts showing that discovery thereof occurred February 4, 1929, that negotiations with regard to settlement commenced "subsequent to" June 1, 1930, and extended to March 1, 1933, and failing to show giving of notice of rescission, which was relief sought, *held* demurrable under statute imposing three-year period of limitations on action for fraud (Code Civ.Proc. § 338, subd. 4).

10. Pleading ⇐54

Where first count of stockholder's complaint failed to state cause of action not barred by three-year limitation for corporate agent's fraud in inducing purchase of stock, second count, incorporating first count and alleging that stockholder loaned money to corporation and received note and bonus of stock, and praying for judgment in amount loaned, and for cancellation of certificate for shares of stock, *held* not to state cause of action against agent (Code Civ.Proc. § 338, subd. 4).

11. Pleading ⇐54

Where first two counts of stockholder's complaint failed to state cause of action against corporate agent arising out of sale of stock and taking of stock as bonus for loan to corporation, subsequent counts, incorporating first two counts, for amount which stockholder had paid or might be compelled to pay in stockholder's liability actions, *held* not to state cause of action against agent.

12. Pleading ⇐225(1)

Sustaining demurrer to second amended complaint without leave to amend could not be held error where it did not appear that leave to amend further was asked.

In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Norris K. Davis against the Rite-Lite Sales Company and others. From a judgment for defendant Herbert W. Erskine, which judgment made no disposition of the case against the other defendants, plaintiff appeals.

Affirmed.

Harry F. Sullivan, of San Francisco, for appellant.

Keyes & Erskine, William A. White, and Young, Hudson, & Rabinowitz, all of San Francisco, for respondent.

SEAWELL, Justice.

Plaintiff, Norris K. Davis, brought this action against Rite-Lite Sales Company, a corporation, Herbert W. Erskine and James J. Hughes. After sustaining the general and special demurrer of defendant Herbert W. Erskine to each of the four counts of the second amended complaint without leave to amend, the court below entered judgment for said defendant, from which plaintiff prosecutes this appeal. Said judgment makes no disposition of the case against the other defendants.

In the first count plaintiff alleges that he purchased 20 shares of stock of defendant Rite-Lite Sales Company, for which he paid $2,000. He purchased said stock, he alleges, in reliance on representations of defendant Herbert W. Erskine, which will be set forth hereinafter. As to this count of the complaint plaintiff prays for judgment against all defendants for $2,000 and for cancellation of the certificate issued to him for said 20 shares. By the complaint plaintiff offers to restore the 20 shares.

[1] The allegations of the complaint and the prayer for relief mark the action as one for rescission of the contract of sale of said stock. Although it is not alleged that defendant Erskine was acting as agent for the corporation in the sale to plaintiff, this is to be inferred from the nature of the relief sought. Otherwise no basis whatever would appear for a judgment for $2,000 against said corporation. There is an allegation that the purchase price of the stock was paid to Erskine, but no allegation that he retained it. There are conflicting expressions in the decisions as to whether, in an action for rescission based on fraud of an agent in effecting a sale, recovery of the purchase price may be had against such agent who has retained no part of the purchase price, or the sole remedy against him is for damages for fraud and deceit. Pollak v. Staunton, 210 Cal. 656, 665, 293 P. 26; Conlin v. Studebaker Bros. Co., 175 Cal. 395, 165 P. 1009; Smith v. Bach, 53 Cal.App. 63, 199 P. 1106; Id., 54 Cal.App. 236, 201 P. 611; permitting recovery of purchase price: Heintzsch v. La France, 3 Cal.(2d) 180, 44 P.(2d) 358; Hohn v. Peters, 216 Cal. 406, 14 P.(2d) 519; Stirnus v. Adams, 50 Cal.App. 730, 734, 195 P. 955. It is not necessary to resolve this question in the case herein, for we are of the view that the complaint fails to state a cause of action against defendant Erskine either for rescission or for damages.

[2, 3] An action for damages is based on an affirmance of the contract; an action for rescission on a disaffirmance thereof. Hines v. Brode, 168 Cal. 507, 511, 143 P. 729; Bancroft v. Woodward, 183 Cal. 99, 190 P. 445; Conlin v. Studebaker Bros. Co., supra; 25 Cal.Jur. 561; 12 Cal.Jur. 787. The two remedies are mutually inconsistent, although damages may be prayed for in the event rescission cannot be had. Bancroft v. Woodward, supra. The complaint herein attempts to state a cause of action for rescission, rather than for damages. The measure of damages in an action by a defrauded vendee is the difference between the actual value of the property at the time of sale and what it would have been worth if the representations had been true. Hines v. Brode, 168 Cal. 507, 143 P. 729; Wood v. Niemeyer, 185 Cal. 526, 197 P. 795; 25 Cal. Jur. 563; 12 Cal.Jur. 843. Plaintiff herein does not allege these facts. He alleges only that the 20 shares of stock are worthless, which must be construed as relating to the date of commencement of the action, more than seven years after the sale. But there are more fundamental defects in the complaint which render it insufficient to state a cause of action either for rescission or damages.

As noted above, the action was commenced more than seven years after the sale to plaintiff, which, he alleges, took place on August 2, 1927. Prior to that time defendant Erskine and others had organized the defendant corporation, Rite-Lite Sales Company, under the laws of this state. The corporation was organized, it is alleged, for the express purpose of handling the exclusive sale of a spotlight or lamp for use on motor cars, to be known as the "Rite-Lite."

The scheme as represented to plaintiff by Mr. Erskine on or about August 2, 1927, was that the E. & J. Lamp Company "had and owned under a United States patent, all of the rights for the manufacture and sale" of said lamp in the United States. The E. & J. Lamp Company was to manufacture the lamp. The Rite-Lite Company had acquired or was about to acquire "a fifty (50) per cent interest in said E. & J. Lamp Company," and said Rite-Lite Company would have the exclusive sales agency for said Rite-Lite. Defendant Erskine had acted as plaintiff's attorney, but it is not alleged that he was so acting for him at the time of the transactions herein.

The basis of the plan was that the E. & J. Lamp Company owned a patent for the sale and manufacture of Rite-Lite. In February, 1929, it is alleged, a federal court interlocutory decree was entered in favor of the Owl Lamp Company restraining and prohibiting the E. & J. Lamp Company and the defendants herein (Rite-Lite Sales Company, Herbert W. Erskine, and James J. Hughes) from manufacturing or selling Rite-Lite. By reason thereof the stock sold to plaintiff is alleged to be worthless.

There is no allegation that the representations made by Erskine were false when made. It is not alleged that a patent had not been issued to the inventor of the Rite-Lite, or that the E. & J. Lamp Company did not own all rights under such patent. The charge against Erskine, alleged on information and belief only, is that he knew on August 2, 1927, when the sale to plaintiff was made, that the inventor of the Rite-Lite had previously received a patent for a spotlight for motors known as the Owl Lamp, which was then being manufactured by the Owl Lamp Company, and the inventor of said lamp had worked for the Owl Lamp Company. Yet defendant Erskine, it is alleged, did not before making the representations to plaintiff "thoroughly, or completely, or at all, investigate or compare the patents for said Rite-Lite with the patents for said Owl Lamp to ascertain whether the patent covering the Rite-Lite infringed in any way upon the patents for said Owl Lamp." But nowhere in the complaint is it alleged that the patent covering the Rite-Lite did infringe upon the patent for the Owl Lamp. It is not alleged that the federal court injunction was granted on such ground.

In a subsequent paragraph it is alleged in addition, on information and belief, that defendant Erskine knew that the Rite-Lite had been designed and developed by the inventor of the Owl Lamp at the expense of the Owl Lamp Company, and in its shops, but it is not alleged that Erskine knew this when he made the representations to plaintiff.

The intent of plaintiff in this allegation is to indicate, apparently, that the patent for Rite-Lite, even though it did not infringe on the patent for the Owl Lamp, would nevertheless be the property of the Owl Lamp Company. But it is not alleged that said patent at any time was the property of the Owl Lamp Company, or that it was not the property of the E. & J. Lamp Company. For all that appears in the complaint the Rite-Lite patent rights may have been the property of the E. & J. Lamp Company by arrangement with the inventor thereof and the said Owl Lamp Company at the time when the representations were made to plaintiff, and the injunction may have been granted for reasons occurring after the sale of the 20 shares to plaintiff. The grounds of the federal court injunction are not set forth, and said injunction is alleged to be an interlocutory decree. It does not appear that the issues in said suit have been finally determined, or that a final decree has been entered enjoining the manufacture of the Rite-Lite by the E. & J. Lamp Company or its sale by said company or by the Rite-Lite Company. All that appears from the complaint is that the stock of the Rite-Lite Company became worthless by virtue of said interlocutory decree. By representing that the E. & J. Lamp Company owned under a patent all the rights for the manufacture and sale of the Rite-Lite, defendant Erskine did not guarantee that patent infringement suits would not be brought against said patent.

[4, 5] In an action for fraud and deceit the allegations of fraud must be clear and unequivocal. The above matters, as well as many others, are urged by respondent as grounds for affirming the judgment entered after sustaining his general demurrer and his special demurrer on the grounds of uncertainty, ambiguity, and unintelligibility. Said grounds of demurrer are well taken.

[6] There are further reasons why the demurrer was properly sustained. The period of limitations in actions for fraud is three years (section 338, Code Civ.Proc., subd. 4); that is, three years after discovery of the fraud. But, if action is brought more than three years after the commission of the fraud, the facts relating to such discovery should be detailed in order that the court may determine whether, with due dil-

igence, the fraud should have been discovered sooner. Consolidated, etc., Co. v. Scarborough, 216 Cal. 698, 703, 16 P.(2d) 268; Kelly v. Longan, 5 Cal.(2d) 274, 53 P.(2d) 971.

In the case herein the acts upon which plaintiff relies as constituting the fraud were committed in August, 1927. The action was not filed until November 1, 1934, over seven years later. In January, 1928, he alleges, he learned of the federal court action by the Owl Lamp Company and of the facts upon which the instant action is based. In paragraph 11 he set forth certain negotiations with regard to settlement with Erskine "subsequent to June 1, 1930," and "until March, 1933." Without regard to the insufficiencies and uncertainties which respondent urges as to said paragraph, and assuming the facts therein are sufficient to toll the statute during the pendency of such negotiations, nevertheless, after the deduction of the period between June 1, 1930, and March 1, 1933, more than three years remain between January 1, 1928, and November 1, 1934, the date of action filed.

[7] Taking February 4, 1929, the date of the federal decree, as the time for commencement of the running of the statute, and deducting the full period between June 1, 1930, and March 1, 1933, the action would be brought within several days of the lapse of the three-year period. But it is not alleged that the negotiations for settlement commenced on June 1, 1930, but "subsequent to June 1, 1930." In an action for fraud brought more than three years after the perpetration of the acts of fraud alleged, the plaintiff is held to stringent rules of pleading. Consolidated, etc., Co. v. Scarborough, supra; Kelly v. Longan, supra.

[8, 9] Furthermore, viewed as an action for rescission, it appears that rescission has not been sought promptly. This is not a case where it is alleged that prior to suit the plaintiff rescinded the contract by giving notice of rescission and offering to restore the certificate of stock. No prior notice or offer is alleged. If this is a case where rescission may be sought by action without prior notice, the filing of suit constituting notice (Hayt v. Bentel, 164 Cal. 680, 130 P. 432), at least the plaintiff should have brought the action as promptly as he would have been required to give notice to the seller had he rescinded through such notice. The plaintiff cannot wait the full statutory period for bringing an action based on fraud without prior notice of rescission, and then bring an action therefor, in the absence of most unusual circumstances. If he would rescind, either by notice to the seller, or action for rescission, he must act promptly. Campbell v. Title Guarantee, etc., Co., 121 Cal.App. 374, 9 P.(2d) 264; Brown v. Domestic Utilities Mfg. Co., 172 Cal. 733, 159 P. 163; Bancroft v. Woodward, 183 Cal. 99, 190 P. 445; 12 Cal.Jur. 796. Here plaintiff permitted a long period to elapse even after the unsuccessful termination in March, 1933, of the negotiations for settlement. The action is barred.

[10] In the second count of the complaint plaintiff alleges that he loaned to the Rite-Lite Sales Company the sum of $2,750. The date of this loan is not alleged. Thereafter, it is alleged, on May 14, 1928, said corporation executed its promissory note for said sum, which remains unpaid. As a bonus for this loan plaintiff was to receive 45 additional shares of stock in defendant corporation. The note, annexed to the complaint, provides for payment from the proceeds of lamps sold by the corporation, at the rate of 33⅓ cents for every lamp sold. Plaintiff prays for judgment against defendants in the sum of $2,750 and for cancellation of the certificate for 45 additional shares. He incorporates by reference the allegations upon which he relied in count one to establish fraud of defendant Erskine. Defendant Erskine is not liable in a suit on the promissory note, since not he, but the corporation, was the maker thereof. An action to recover from Erskine the amount loaned to the corporation on the theory that it was advanced in reliance on fraudulent representations of Erskine is not stated. The weakness and deficiency of the first count to state a cause of action not barred by the statute of limitations are carried into the second count, which incorporates allegations of the first count, and makes them the basis of the second count.

[11] In the third and fourth counts plaintiff seeks judgment against defendants, including Erskine, for amounts which he has paid or may be compelled to pay in stockholders' liability actions brought against him by creditors of the Rite-Lite Sales Company. Allegations of the first two counts are incorporated by reference in these last two counts. Since plaintiff has failed to state a valid cause of action against defendant Erskine arising from the sale of 20 shares of stock to plaintiff, or the issue of 45 additional shares to him, plaintiff cannot hold Erskine liable for such sums as

the plaintiff has paid or may be required to pay by virtue of actions brought against him as a stockholder of Rite-Lite Sales Company.

[12] The complaint to which the demurrer herein was sustained without leave to amend was the second amended complaint. It does not appear that leave to amend further was asked. In this situation it may not be claimed that it was error not to grant further leave to amend. Stillwell Hotel Co. v. Anderson, 4 Cal.(2d) 463, 50 P.(2d) 441; Haddad v. McDowell, 213 Cal. 690, 3 P.(2d) 550.

The judgment is affirmed.

We concur: THOMPSON, J.; SHENK, J.; CURTIS, J.; LANGDON, J.



8 Cal.2d 684

LESLIE v. RITE-LITE SALES CO. et al.

S. F. 15546.

Supreme Court of California.

May 1, 1937.

Corporations ⇐80(12)

Stockholder's complaint, alleging that purchase of stock was induced by certain representations of defendant, including representation of guaranty, but failing to allege that representations were made on behalf of another defendant, and containing other defects, *held* not to state cause of action against such other defendant.

In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Albert Leslie against the Rite-Lite Sales Company and others. From a judgment for defendant Herbert W. Erskine, plaintiff appeals.

Affirmed.

Harry F. Sullivan, of San Francisco, for appellant.

Keyes & Erskine, William A. White and Young, Hudson & Rabinowitz, all of San Francisco, for respondent.

PER CURIAM.

The complaint in this action is similar to that in Davis v. Rite-Lite Sales Company (Cal.Sup.) 67 P.(2d) 1039, the judgment in which is this day affirmed. In the instant case, as in that case, defendant Herbert W. Erskine filed a general and special demurrer to the second amended complaint. After sustaining said demurrer without leave to amend, the court entered judgment in favor of defendant Erskine.

In the instant case it is not alleged that any representations to plaintiff were made by defendant Erskine. The representations are alleged to have been made by defendant Hughes. The agency of Hughes to bind Erskine by his representations is not sufficiently alleged. The complaint herein does not contain any allegations such as are set forth in paragraphs five and seven of the first count in the Davis Case with reference to facts known by Erskine as to the Rite-Lite and Owl Lamp having been invented by the same person. The complaint herein contains an allegation, not present in the Davis Case, that Hughes represented that if plaintiff would purchase stock he (Hughes) would see to it that plaintiff suffered no loss by reason thereof, and guaranteed to save plaintiff harmless. But it is not alleged that this guaranty was made on behalf of defendant Erskine.

On the authority of our decision in Davis v. Rite-Lite Sales Company, 67 P.(2d) 1039, and by reason of additional defects in the complaint herein to state a cause of action against defendant Erskine, the judgment in his favor is affirmed.

8 Cal.2d 690

NIELSEN et al. v. McKENNA.

S. F. 15549.

Supreme Court of California.

May 12, 1937.

1. Trial ⇐140(1)

In action to rescind contract to purchase house on ground of fraud in misrepresenting age thereof, trial court was not required to credit the allegations of purchasers and their witnesses although vendor who died prior to trial was not available to refute the alleged misrepresentations.

2. Vendor and purchaser ⇐44

In action to rescind contract to purchase a house on ground of fraud in misrepresenting age thereof, evidence that purchasers relied on their own investigation, and had suffered no damage, and that age of house was immaterial, *held* insufficient to show fraud justifying rescission.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by Ethel G. Nielsen, also known as C. E. Nielsen, and Carl C. Nielsen against Mary E. Morrow, for whom upon her death was substituted Margaret McKenna, as executrix, and the Northern Counties Title Insurance Company. Defendants filed a cross-complaint. From a judgment for defendants on the cross-complaint, plaintiffs appeal.

Affirmed.

Gerald C. Halsey and Frederic T. Leo, both of San Francisco, for appellants.

Stanislaus A. Riley, of San Francisco, and Jordan L. Martinelli, of San Rafael, for respondent.

PER CURIAM.

The sole question on this appeal is that of the sufficiency of the evidence to support the findings and judgment.

On April 29, 1932, plaintiffs contracted to purchase from defendant Mary E. Morrow a six-room dwelling at 414 Collingwood street, San Francisco, for $4,000, $1,000 cash and the balance secured by note and deed of trust payable in installments of $40 a month. Plaintiffs made frequent payments until September, 1933, when they gave notice of rescission for fraud, followed by the filing, in October, of this action. The complaint herein alleged that the sale was induced by misrepresentation of a material fact—of the age of the dwelling as twelve years, whereas it had been erected at least nineteen years—which misrepresentation was not discovered until two weeks prior to giving of the notice of rescission. An answer was filed by defendants and also a cross-complaint wherein they alleged default by plaintiffs under the terms of the note and deed of trust, and prayed for sale of the property thereunder and for judgment for any deficiency which might be found to exist. Prior to trial defendant Mary E. Morrow died and Margaret H. McKenna, as executrix of her last will and testament, was duly substituted in her place as party defendant herein. Thereafter trial of the cause was had before the court, sitting without a jury, and the court made findings in favor of defendant and gave judgment as prayed in the cross-complaint.

The trial court found that it was not true that in order to induce plaintiffs to enter into the agreement of purchase, defendant falsely and fraudulently stated and represented to plaintiff Ethel G. Nielsen that the dwelling was "approximately twelve years old and no more," and in this particular the court found that "plaintiffs conducted their own investigation and examination of said premises and purchased the said property as a result of said investigation and examination and not as the result of any representation or statement by said Mary E. Morrow or her agent * * * that said Mary E. Morrow and plaintiffs never met prior to the time that the transaction was completed." The court found that no representation of Mary E. Morrow was, at the time of making thereof, false or untrue or made with intent to induce plaintiffs to proceed with the purchase; that the dwelling was at the time of sale between seventeen and eighteen years old, but that no statement was made as to its age until after the payment by plaintiffs of the deposit and the signing by them of the agreement to purchase. The court found that it was not true that if plaintiffs had known the building was between seventeen and eighteen years of age they would not have made the purchase, but that "plaintiffs were perfectly satisfied with said building in its then condition and that their dissatisfaction did not arise un-

til many months thereafter when the tenant then occupying said building as tenant of said plaintiffs began to fall delinquent in his payments of rent." The court further found that there was no proof that if the real property had been approximately twelve years old and no more it would have been reasonably worth $5,000 or that in truth and fact it was not at the time of the transaction worth the agreed purchase price. The court also found that plaintiffs had not been damaged by any matter of fact or thing in the said transaction. It further found that the sources of information upon which plaintiffs relied in support of their contention as to the age of the building consisted of public records (notice of completion of building, sworn to by Mary E. Morrow, recorded November 27, 1914, vol. 66, Miscellaneous Records, San Francisco, p. 266), which were at all times available to plaintiffs and that there was no reason why plaintiffs, if interested in ascertaining the exact age of the building, could not have consulted said public records at or before the time they signed the purchase agreement and paid money thereunder; that "prior to the time when plaintiffs' said tenant became delinquent in the payments of his rents the said plaintiffs were not interested in determining the exact age of said building." The court found that all negotiations between the parties merged into the written agreement of April 29, 1932, and at all times from that date plaintiffs had notice of the age of the building and of all matters set forth in their complaint and notice of rescission and that "with such notice they delayed giving notice of their attempted rescission and that the said delay worked to the prejudice of the said Mary E. Morrow and of said executrix in that the real estate market dropped in the interim and the price at which said property could be resold was at the time of the service of said notice and now is less than the price which could be realized upon a sale as of the 29th day of April, 1932." Lastly, the court found all of the allegations of the cross-complaint to be true. As already stated, these findings resulted in entry of a judgment for defendant upon her cross-complaint and an appeal by plaintiffs, advancing the sole claim of insufficiency of the evidence to support the findings and judgment.

Whatever strength appellants' argument may have is derived from the fact that as Mary E. Morrow died prior to trial, she was not available to testify in refutation of the misrepresentation charge. Appellants claim that they made a complete prima facie case and as defendant offered no evidence and nothing appears in the record which impairs the credibility of appellants' witnesses, the judgment for defendant is not sustainable.

[1, 2] The evidence shows that an advertisement of a realtor, Mr. Renstrom, on April 22, 1932, attracted appellants' attention and led appellant Ethel G. Nielsen to investigate the property. This advertisement made no reference to the age of the dwelling. Said appellant testified that she called at the real estate office and talked to a salesman Mr. Kovas, who told her that the dwelling was in splendid repair, as the owner had always lived there, and that it was ten or twelve years old. Mr. Kovas was not a witness on the trial of the cause. Said appellant admitted that after talking to him, she twice visited the dwelling. The realtor, Mr. Renstrom, took the stand and stated that Mary E. Morrow had told him the house was about twelve years old and he so advertised it. But this latter advertisement, which stated that the house had been "built about 12 years" was not published until May 1st, the day after execution of the contract of purchase here involved. The advertisement of April 22d, which attracted appellants' attention, contained no reference to the time the dwelling had been erected. Subsequent to the purchase, Mr. Renstrom handled the property for appellants and collected rentals for them. The house was almost immediately rented for $45 a month, and the evidence supports the trial court's conclusion that it was only when the tenant became delinquent in payment of his rents that appellants became interested in determining the exact age of the building, and in rescinding the purchase. The trial court was not required to credit the assertions of appellants and their witnesses. An examination of the record indicates clearly that in connection with the making of this purchase, the age of the house was not a material factor and the statement of Mr. Kovas as to age—even if it was authorized or emanated from Mary E. Morrow—was not material. Appellants did not rely upon it but relied upon their own investigation and examination of the premises and furthermore there is no showing whatsoever that they suffered

any damage at all, either due to the age of the building or in any other respect.

The judgment is affirmed.



8 Cal.2d 663

EMERY et al. v. PACIFIC EMPLOYERS INS. CO.

L. A. 16049.

Supreme Court of California.

April 30, 1937.

1. Insurance ⇐311(1)

Under statute and automobile liability policy providing that injured person who secured judgment against insured might bring action against insurer on policy "subject to its terms and limitations," if policy were void or voidable as to insured, injured persons who had secured judgment could not recover thereon (St.1919, p. 776).

2. Appeal and error ⇐185(1)

Question of jurisdiction of superior court as respects amount of plaintiff's demand could be raised for first time on appeal, since parties could not by their consent confer jurisdiction (Code Civ.Proc. § 434, § 89, as amended by St.1933, p. 1811; Gen.Laws 1931, Act 5238, § 29).

3. Action ⇐50(4)
Judgment ⇐240

As respects right of action on automobile liability policy under amendment to Code of Civil Procedure, persons who have sustained personal injuries in same accident may bring single action against wrongdoer or his insurer, but judgments recovered by several plaintiffs are several judgments (Code Civ.Proc. § 378, as amended by St. 1927, p. 631).

4. Courts ⇐121(4)

Where joinable claims of several plaintiffs are each below jurisdictional minimum of superior court, action therein must be brought in lower court, notwithstanding aggregate of claims is above such jurisdictional minimum (Code Civ.Proc. § 89, as amended by St.1933, p. 1811).

5. Courts ⇐121(4)

Where single plaintiff has properly joinable causes of action against several defendants, claim against each being for amount within jurisdiction of lower court, action must be brought in such lower court, notwithstanding total amount sued for is within jurisdiction of superior court (Code Civ.Proc. § 89, as amended by St.1933, p. 1811).

6. Courts ⇐121(4)

Where single plaintiff has several small claims against a defendant, total sum sued for is the test of jurisdiction, notwithstanding some of claims have been assigned to plaintiff for collection only (Code Civ.Proc. § 89, as amended by St.1933, p. 1811).

7. Courts ⇐121(7)

Where plaintiff brings action in superior court, counterclaim or cross-complaint may be asserted for amount within jurisdiction of inferior court (Code Civ.Proc. § 89, as amended by St.1933, p. 1811).

8. Courts ⇐121(7)

Where case stated in complaint is not within jurisdiction of superior court, but defendant sets up cross-complaint sounding in equity, and hence within jurisdiction of superior court, such court has jurisdiction of both causes of action (Code Civ.Proc. § 89, as amended by St.1933, p. 1811).

9. Courts ⇐121(7)

Where plaintiff brings action in superior court, defendant may recover upon claims arising out of transaction on which complaint is based, though amount claimed is less than jurisdictional amount of superior court, and though plaintiff is denied recovery and there is no offsetting of one recovery against the other (Code Civ. Proc. § 89, as amended by St.1933, p. 1811).

10. Courts ⇐23

Where jurisdiction is involved, acts of consent of parties cannot enlarge power of court.

11. Courts ⇐121(4)

Under statute limiting jurisdiction of superior court to "case" involving $2,000, where holders of judgments for $1,100 and for $4,200 for injuries arising from same automobile accident brought action on judgment debtor's automobile liability policy, superior court *held* to have jurisdiction of cause of action for $1,100, since the two joinable "causes of action" constituted the "case"; term "case" not being synonymous with "cause of action" (Code Civ.Proc. § 89, as amended by St.1933, p. 1811; § 378, as

amended by St.1927, p. 631; Gen.Laws 1931, Act 5238, § 29).

[Ed. Note.—For other definitions of "Case" and "Cause of Action," see Words & Phrases.]

12. Insurance ⇐268

Breach of warranty in its inception prevents policy from attaching to risk (Civ. Code § 2612).

13. Insurance ⇐231

Under provision of automobile liability policy that insured may request cancellation at any time, and that insurer may cancel by giving five days' notice, effective termination of insurance does not depend on return of policy to insurer.

14. Insurance ⇐286

Cancellation of automobile liability policy at request of insured or by mutual consent would not constitute breach of warranty to subsequent insurer that no insurer had declined, canceled, or refused to continue automobile insurance.

15. Insurance ⇐286

As respects whether insured falsely warranted in application for automobile liability policy that no insurer had declined, canceled, or refused to continue automobile insurance, if insurer clearly and unequivocally indicates unwillingness to continue upon risk, there is a "refusal" by insurer, within meaning of such warranty, even where insurer requests that insured return policy for cancellation and insured complies.

[Ed. Note.—For other definitions of "Refuse; Refusal," see Words & Phrases.]

16. Insurance ⇐665(3)

Evidence that automobile liability insurer wrote to insured's broker to obtain cancellation of policy on desire of insured to cancel policy because of unsuccessful negotiations to extend policy retroactively, and that such letter concluded, "Let us have your advice," *held* to show cancellation by mutual consent which did not make insured's warranty to subsequent insurer that no insurer had declined, canceled, or refused to continue automobile insurance false so as to make subsequent policy void.

17. Insurance ⇐229(3)

Agent of insured to procure insurance is not agent for cancellation, and notice of cancellation to such agent is not notice to insured, but agent may actually communicate notice to insured.

18. Insurance ⇐655(3)

In action on automobile liability policy by parties injured by insured, rejecting as evidence letters of another insurer to insured's broker showing that such other insurer desired to cancel policy because of high loss ratio, which was offered to show falsity of warranty that no insurer had previously canceled automobile insurance, *held* error, especially under evidence showing that broker was insured's agent for cancellation as well as for procuring insurance.

19. Evidence ⇐272

In action on automobile liability policy by parties injured by insured, rejecting evidence of statement of insured that another insurer had canceled previous insurance, offered to show falsity of warranty that no insurer had previously canceled automobile insurance, *held* error, since such declaration was one against interest.

20. Evidence ⇐471(3)

In action on automobile liability policy by parties injured by insured, testimony of insured and his broker as to whether prior policies had been canceled, and as to whether notices of cancellation had been received from insurers, *held* admissible on issue of falsity of warranty that no insurer had previously canceled automobile insurance, as against contention that such testimony would constitute conclusions of law.

In Bank.

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

Action by Edna Earl Emery and another against the Pacific Employers Insurance Company. From a judgment for plaintiffs upon a directed verdict, defendant appeals.

Reversed.

For prior opinion, see 59 P.(2d) 598.

Kenneth J. Murphy and Ralph E. Lewis, both of Los Angeles (F. Britton McConnell, of Los Angeles, of counsel), for appellant.

Charles H. Goebel, of Los Angeles, Bronson, Bronson & Slaven, of San Francisco, and C. F. Jorz and Albert J. Morrissey, both of Los Angeles, amici curiæ.

Jules C. Goldstone, Paul J. Ziegler and William Berger, all of Los Angeles, for respondents.

SEAWELL, Justice.

Plaintiffs Edna Earl Emery and Lillian M. Beal recovered judgment in the sums of $1,100 and $4,200, respectively, against James Bronis for personal injuries received when the automobile in which they were riding was struck by an automobile owned and driven by Bronis. The judgment being unpaid, they brought this action against defendant Pacific Employers Insurance Company upon a policy of automobile liability insurance issued by it to Bronis. From a judgment for plaintiffs upon a directed verdict defendant prosecutes this appeal.

[1] The contention of the defendant insurance company is that the policy is void by reason of false representations contained in the application for insurance and false warranties of the insured in the policy. By statutory provision and similar terms of the policy the right of the injured person who has secured judgment against the insured is to bring an action against the insurer "on the policy and subject to its terms and limitations." Hence if the policy is void or voidable as to Bronis, plaintiffs cannot recover thereon. Stats.1919, chap. 367, p. 776; Purefoy v. Pacific Auto. Indem. Exch., 5 Cal.(2d) 81, 53 P.(2d) 155; Hynding v. Home Acc. Ins. Co., 214 Cal. 743, 7 P.(2d) 999, 85 A.L.R. 13; General Acc., etc., Corp. v. Industrial Acc. Comm., 196 Cal. 179, 190, 237 P. 33; Sears v. Illinois Indemnity Co., 121 Cal.App. 211, 9 P.(2d) 245.

[2] Upon oral argument in this court defendant urged for the first time that as the demand of plaintiff Edna Earl Emery was for less than $2,000 the superior court of Los Angeles county did not have jurisdiction thereof, but jurisdiction was in the municipal court. Section 89, Code Civ. Proc. (as amended by St.1933, p. 1811); section 29, Municipal Court Act, 2 Deering's Gen.Laws, p. 2925, Act 5238. The question of jurisdiction may be raised for the first time on appeal, since the parties cannot by their consent confer jurisdiction. Section 434, Code Civ.Proc.; Norager v. Mountain States Life Ins. Co., 10 Cal.App.(2d) 188, 51 P.(2d) 443; Adolph M. Schwartz, Inc., v. Burnett Pharmacy, 112 Cal.App. (Supp.) 781, 784, 295 P. 508; Maguire v. Cunningham, 64 Cal.App. 536, 540, 222 P. 838.

[3] The action against James Bronis wherein plaintiffs recovered the judgments which are the basis of the instant action was a single action. Since the 1927 amendment of section 378, Code of Civil Procedure (St.1927, p. 631), persons who have sustained personal injuries in the same accident may bring a single action. Colla v. Carmichael U-Drive Autos, Inc., 111 Cal. App. (Supp.) 784, 294 P. 378; Peters v. Bigelow, 137 Cal.App. 135, 30 P.(2d) 450. A single action against the defendant's insurer, as in the case herein, is also authorized under said section. But the judgments recovered by the several plaintiffs in the single action against the negligent defendant, and in the subsequent action against his insurer, are several judgments. Each plaintiff recovers upon his separate cause of action. No plaintiff has any interest in the sum awarded to another plaintiff.

[4-6] It is the law that where the joinable claims of several plaintiffs are each below the jurisdictional minimum of the superior court, action therein must be brought in the lower court, notwithstanding the aggregate of the claims is above said jurisdictional minimum. Colla v. Carmichael U-Drive Autos, Inc., supra; Winrod v. Wolters, 141 Cal. 399, 74 P. 1037; Miller v. Carlisle, 127 Cal. 327, 59 P. 785. It is likewise held that where a single plaintiff has properly joinable causes of action against several defendants, the claim against each being for an amount within the jurisdiction of the lower court, action must be brought in said lower court, notwithstanding the total amount sued for is within the jurisdiction of the superior court. Heavilin v. Westchester Fire Ins. Co., 12 Cal.App.(2d) 695, 56 P.(2d) 252; Myers v. Sierra Valley, etc., Ass'n, 122 Cal. 669, 672, 55 P. 689. But where a single plaintiff has several small claims against a defendant, it is the total sum sued for which is the test of jurisdiction, and this is the rule notwithstanding some of the claims have been assigned to plaintiff for collection only. Hammell v. Superior Court, 217 Cal. 5, 17 P.(2d) 101, citing cases; Trinidad Bean & Elevator Co. v. Superior Court, 128 Cal.App. 355, 17 P.(2d) 153.

The question in the instant case is as to the rule where the cause of action of one plaintiff against the single defendant is for an amount below the jurisdiction of the superior court, and that of the other plaintiff for an amount within such jurisdiction. Has the superior court jurisdiction of both claims by virtue of the fact that they are otherwise joinable and one of the claims is for an amount within the juris-

diction of the superior court? In such a case as the instant one it would be highly desirable to permit the single action in the superior court rather than to require separate actions for the trial of identical issues.

[7, 8] It has been held that where a plaintiff brings an action in the superior court a counterclaim or cross-complaint may be asserted for an amount within the jurisdiction of an inferior court. Todhunter v. Smith, 219 Cal. 690, 28 P.(2d) 916; Sullivan v. California Realty Co., 142 Cal. 201, 75 P. 767; Gregory v. Diggs, 113 Cal. 196, 45 P. 261; Kling v. Kimball Pump Co., 138 Cal.App. 470, 32 P.(2d) 659. In the recent case of Brix v. People's Mutual Life Ins. Co., 2 Cal.(2d) 446, 41 P.(2d) 537, where the case stated in the complaint was not within the jurisdiction of the superior court, but the defendant set up a cross-complaint sounding in equity and hence within the jurisdiction of the superior court, it was held that said court had jurisdiction of both causes of action. Note, 24 Cal.Law Rev. 339. We also held in two recent cases that a single action in the superior court could be prosecuted against a real estate broker for $5,000 and against the surety on his statutory real estate broker's bond for the penal sum of the bond in the amount of $1,000, which amount was within the jurisdictional limit of the municipal court, although it is not required that they be sued in a single action. Kane v. Mendenhall, 5 Cal.(2d) 749, 56 P.(2d) 498; Kaufman v. Pacific Indem. Co., 5 Cal.(2d) 761, 56 P.(2d) 504. But in a line of decisions involving suits against stockholders upon their proportionate stockholders' liability under section 322, Civil Code, as it stood prior to 1931, providing for a joint or several action against such stockholders, it was held that claims against stockholders for less than $300 each were required to be prosecuted in the justice's court and could not be joined with larger claims against other stockholders in a superior court action. Derby v. Stevens, 64 Cal. 287, 30 P. 820; Myers v. Sierra Valley, etc., Ass'n, supra; Hyman v. Coleman, 82 Cal. 650, 23 P. 62, 16 Am.St.Rep. 178; Johnson v. Hinkel, 29 Cal.App. 78, 154 P. 487.

[9] In the counterclaim and cross-complaint cases the demand of the defendant for a lesser amount is a separate cause of action, although arising out of the same transaction, no less than are the separate demands of the two plaintiffs in the instant action. Yet it is held that the superior court has jurisdiction of a claim below its usual jurisdictional limit in such cases. It is true that in these cases the cross-demands are between the same parties. But the defendant is allowed recovery upon claims arising out of the transaction on which the complaint is based even though the plaintiff is denied recovery and there is no offsetting of one recovery against the other. Sullivan v. California Realty Co., supra; Moore v. Groftholdt, 10 Cal.App. 714, 103 P. 149; Kling v. Kimball Pump Co., Inc., supra.

[10] It has been said in one of the cross-complaint cases that the plaintiff should not be able to object to defendant's asserting his small demand in the superior court because the plaintiff has himself brought the defendant into that court. Sullivan v. California Realty Co., supra. But this is not a decisive distinction between said cases and the instant case, for where jurisdiction is involved it is the rule that the acts of consent of the parties cannot enlarge the power of the court.

[11] It may also be argued that the case of a single action against a real estate broker and his surety on the separate causes of action against them is distinguishable from the instant case in that there is really but one debt due to the plaintiff. Payments by either broker or surety would reduce such single debt. In the instant case neither plaintiff will have any interest in any sum recovered by the other. However, if by reason of the presence of the larger claim the jurisdiction of the superior court attaches to the smaller demand in the counterclaim, cross-complaint and surety cases, we are of the view that it properly may be held to attach to the smaller claim against the defendant Edna Earl Emery herein, which is joinable with the claim of plaintiff Lillian M. Beal for $4,200. The two joinable causes of action together constitute the "case" within the meaning of the jurisdictional provisions, and if the total demand of one of said plaintiffs against the defendant is beyond the jurisdiction of the municipal court, the superior court has jurisdiction of said "case," including both causes of action. The term "case" is not synonymous with "cause of action." Hammell v. Superior Court, supra.

In Scott v. Allen, 4 Cal.App.(2d) 621, 41 P.(2d) 371, the District Court of Appeal reached a decision in line with our conclu-

sion herein. Both plaintiffs therein sued in the superior court of Los Angeles county for the return of the purchase price of units in an oil venture purchased from defendants. One plaintiff sued for $6,000, the other for $1,000. The judgment awarded them for said amounts in the single action in the superior court was affirmed. It is not, however, required that the plaintiffs join in prosecuting a single action in the superior court.

[12] We shall now consider the contention of defendant that the policy upon which this action is based is void because of a false representation in the application therefor and a false warranty in the policy. Strother & Strother, insurance brokers, had acted as Bronis' agent in procuring automobile liability insurance for him from the time he came to California in 1930. The printed form of application for the insurance policy upon which the action herein was brought was filled in and signed by Strother & Strother. Opposite the question "Has this risk been cancelled or rejected by any Company, if so why," the written answer was, "No." Included in the warranties in the body of the policy as issued was the following: "No company has declined, cancelled nor refused to continue automobile insurance, except as follows: No exceptions." It was provided in the policy that the assured, by acceptance of the policy, made the warranties therein contained. A breach of warranty where it is broken in its inception prevents the policy from attaching to the risk. Section 2612, Civ.Code, now section 449, Insurance Code (St.1935, p. 508), Craig v. U. S. Fid. & Guar. Co., 11 Cal.App.(2d) 644, 54 P.(2d) 486; Gilmore v. Eureka Casualty Co., 123 Cal.App. 20, 10 P.(2d) 810; Bennett v. Northwestern Nat. Ins. Co., 84 Cal.App. 130, 257 P. 586.

The trial court directed a verdict for plaintiff on the ground that defendant insurance company had failed to establish that any prior policies had been canceled by the insurer. Defendant contends that there was evidence from which the jury could have found prior cancellations, and further, that the court improperly excluded evidence upon which it relied to prove prior cancellations based on the bad accident record of Bronis.

The policy herein was issued on September 12, 1933. The accident in which plaintiffs were involved took place on September 30, 1933. On October 4, 1933, defendant insurer mailed to Bronis a letter declaring the policy void as of its date of issue by reason of falsity of the above representation and warranty. On the same date it returned to Strother & Strother their check for the premium on Bronis' policy. The insurance company thereafter refused to defend the action brought by plaintiffs herein against Bronis.

Defendant contends that the evidence shows prior cancellations of automobile liability insurance issued to Bronis by the American Surety Company, the Pacific Indemnity Company, and Norwich Union Indemnity Company.

[13, 14] Policies of automobile liability insurance commonly provide that the insured may request a cancellation at any time, and that the company may cancel at any time by giving the insured five days' notice of cancellation. Under such a provision an effective termination of the insurance does not depend on the return of the policy to the company. Richards, Law of Insurance (4th Ed.), p. 446, § 269. A prior cancellation at the request of the insured or by mutual consent, as for instance, upon the sale of the car by the insured, would not constitute a breach of the warranty that "no company had declined, cancelled or refused to continue automobile insurance." Rabin v. Central Business Men's Ass'n, 116 Kan. 280, 226 P. 764, 38 A.L.R. 26, note page 30, citing cases; American Fidelity Co. v. Ginsburg Sons' Co., 187 Mich. 264, 276, 153 N.W. 709.

[15] But it does not follow that wherever the policy has been returned to the company, there must be held to be a cancellation by mutual consent or at the request of the insured. If the insurer clearly and unequivocally indicates its unwillingness to continue upon the risk, there is a refusal by the company within the meaning of the warranty provision, notwithstanding the insurer requests that the insured return the policy for cancellation, with which request he complies. Wells v. Great Eastern Casualty Co., 40 R.I. 222, 100 A. 395.

[16] As to the policy issued by the American Surety Company on June 12, 1933, we are of the view that the evidence shows only a cancellation by mutual consent. The letter written by the insurance company to Strother & Strother, brokers for Bronis, upon which appellant relies to establish a cancellation by the company, itself suggests a desire on the part of the insured, Bronis, to cancel because of unsuc-

cessful negotiations to extend the policy retroactively to protect Bronis as to a slight accident he had been involved in in Mexico. Said letter concludes: "Let us have your advices."

Appellant insurance company contends that there was evidence from which the jury could have found a cancellation of a policy issued on September 8, 1931, by the Pacific Indemnity Company. It appears from the record that said policy was canceled in the sense that it did not run its full course, but was delivered up to the company, and by it destroyed as an effective policy. The court excluded certain instruments upon which defendant relied to establish that this cancellation was "by the company," but they appear in the record as exhibits B and G, marked for identification. Exhibit G is a letter written on February 9, 1932, by L. Clyde Paine, supervisor of underwriting of the casualty and automobile department of Swett and Crawford, insurance underwriters for the Pacific Indemnity Company, to Strother and Strother. Irvin P. Strother testified that he received said letter in due course of mail. The body of the letter is as follows: "Effective September 8, 1931, we issued the above policy for your account. Since that time there have been four accidents reported resulting in five claims and a loss ratio up to the present time of over 700%. We do not feel that we can profitably remain upon this risk and would appreciate it if you would secure the policy and return it to this office for cancellation. We trust that we may have your immediate cooperation on this in order that the cancellation may become effective not later than February 15th."

Exhibit B for identification is as follows:

"Los Angeles, California
"February 16th, 1932

"To James Bronis,
"1154 NorthWestern Avenue,
"Hollywood, California.

"You are hereby notified that Policy Number A U - 121061 issued to you & et al, is cancelled from and after the 22nd day of February, 1932, at 12:00 M. standard time for the reason Company's Election.

"Pacific Indemnity Company
"By J. T. Moore, Authorized Agent.
"MB"

The court excluded exhibit G for identification for the reason it was of the view that it had not been shown that Strother & Strother were agents of Bronis to receive a notice of cancellation, and for the further reason that the provisions of the policy relating to cancellation had not been established. Thereafter counsel for plaintiff stipulated that the Pacific Indemnity Company at the time of the issuance of the policy to Bronis had but one form of automobile liability insurance policy, and also stipulated as to the contents of the cancellation clause in said form. It is identical with the clause in the policy upon which this action is brought, and provides for cancellation by the company upon five days' notice to the insured. We have heretofore stated, however, that a clear and definite refusal by the insurance company to continue insurance in effect, constitutes a cancellation by the company where it is accompanied by a request for return of the policy, with which the insured complied.

[17] It is true that exhibit G was not addressed to the insured, but to Strother & Strother, brokers, who had procured the insurance for Bronis. It is held that an agent of the insured to procure insurance is not an agent for cancellation, and notice of cancellation to such broker is not notice to the insured. Farnum v. Phœnix Ins. Co., 83 Cal. 246, 256, 23 P. 869, 17 Am.St.Rep. 233; Quong Tue Sing v. Anglo-Nevada Assur. Corp., 86 Cal. 566, 25 P. 58, 10 L.R.A. 144; Cronenwett v. Iowa Underwriters of Dubuque Fire & Marine Ins. Co., 44 Cal.App. 571, 575, 186 P. 824; Hooker v. American Indem. Co., 12 Cal.App.(2d) 116, 54 P.(2d) 1128; Richards, Law of Ins. (4th Ed.) § 271, p. 450. But if the notice or communication to the broker is actually communicated by him to the insured, the insured has actual notice.

[18] In the instant case it would seem that upon the testimony of Bronis the jury might have found that Strother & Strother were acting as agents for Bronis for cancellation as well as procuring of insurance. Bronis testified that Strother & Strother would be better able to answer a question as to whether cancellation notices had been received on his policies than he himself would; that if he received anything he turned it over to Strother; that he had nothing to do with the insurance, and that he had implicit faith and confidence in Strother. It also appeared that Strother & Strother carried on correspondence with the insurance companies upon certain of the policies after their issue. See Ferrar v. Western Assur. Co., 30 Cal.App. 489, 492, 159 P. 609, 611. In any event, defendant

should have been permitted to introduce the letter received by Strother & Strother as a first step, to be followed by a showing that it was communicated to Bronis. A termination of the policy upon its return to the company, pursuant to the refusal to continue the insurance contained in this letter, would constitute a cancellation by the company within the meaning of the warranty provision herein.

The above letter was dated February 9, 1932. Exhibit B for identification, dated February 16, 1932, which also was not permitted to be introduced in evidence, and which is set forth above, is in form a notice that the policy is to be canceled by the company after five days' notice. A cancellation upon such notice does not depend upon a return of the policy. Defendant's counsel offered to prove that the original of said notice, addressed to Bronis, was in fact received by him. The court, however, refused to permit said instrument to be introduced after Moore, whose name is attached to the notice, had testified that he had not signed it, nor specially authorized any employee of the company to send it out. It was not shown by whose authority the notice was prepared. Upon a retrial defendant no doubt will establish also this notice of cancellation of February 16, 1932, directed to the insured, as well as the notice of February 9, 1932, directed to the brokers.

[19, 20] Defendant also sought to prove cancellation of automobile liability insurance policies issued in 1930 and 1933 by the Norwich Union Indemnity Company. The witness Addington, claims adjuster for the defendant insurance company in the instant action, testified that after the accident in which plaintiffs were involved Bronis stated that the Norwich Union Indemnity Company had canceled his insurance in the year 1930. The court ruled against the admissibility of this testimony. The statement made by Bronis was admissible as a declaration against interest. Langley v. Zurich Gen. Acc. & L. Ins. Co., 219 Cal. 101, 25 P.(2d) 418. It was to the interest of Bronis at the time when the statement was made and at the time of trial that the defendant insurance company should recognize liability on the policy issued to him. The court also refused to permit the defendant's counsel to ask Bronis and the witness Strother, the broker, whether any policies had been canceled, or as to whether they had received notices of cancellation. We are of the view that said questions in the circumstances appearing in this case did not call for conclusions of law. A question, "Did you receive a notice of cancellation," does no more than ask if the witness received a notice entitled notice of cancellation, or purporting to cancel the policy. It does not call for the witness' statement as to whether the notice was effective to terminate the policy. Nor was the question as to whether prior policies had been canceled improper. Where the question is as to whether prior policies have been canceled by the issuing companies, the insured, or his broker, where the broker has acted for the insured in connection with the cancellation, must be deemed to know as a fact whether prior policies have been terminated before their expiration, and to know whether such termination was by election of the insured or upon the refusal of the insurer to continue insurance. Questions of ultimate fact may develop into questions of law, in which case they may be treated as such, but prima facie a question to the insured as to whether prior policies have been canceled is a question of fact.

For error in the rejection of testimony sought to be offered by defendant the judgment for plaintiff entered upon a directed verdict must be reversed. Respondents do not deny that in fact policies of the Pacific Indemnity Company and the Norwich Union Indemnity Company were canceled upon the refusal of said companies to continue it in effect.

The judgment is reversed.

We concur: SHENK, J.; THOMPSON, J.; CURTIS, J.; LANGDON, J.

RODKEY v. CITY OF ESCONDIDO.

L. A. 16099.

Supreme Court of California.

May 1, 1937.

Rehearing Denied May 27, 1937.

1. Automobiles ⇐276

Mere existence of minor defect, consisting of one-half to three-quarters of an inch sinking of surface of street at edge of dip constructed in street for passage of storm waters, *held* not sufficient to charge city with constructive notice so as to render it liable to guest in automobile for injuries sustained when automobile crossed dip.

2. Statutes ⇐224

Omission of words "at least" by later statute from earlier statute defining a residence district as the territory contiguous to public highway when property fronting on one side of highway for distance of "at least" a quarter of a mile is occupied by thirteen or more separate dwelling houses or business structures, or where property fronting on both sides collectively of highway for "at least" a quarter of a mile is occupied by sixteen or more separate dwelling houses or business structures, *held* not to control meaning of earlier act so as to require that same ratio be maintained throughout length of highway traversing district for six-tenths of a mile in order to constitute it a residence district (St.1935, p. 99, § 90; St.1929, p. 510, § 28½(b).

3. Municipal corporations ⇐764(1)

Municipality, not being an insurer of safety of travelers on its streets, is not bound to maintain its highways in condition to preclude possibility of injury or accident, but is under duty by statute only to exercise ordinary care to maintain its streets in a reasonably safe condition for their use in a proper manner (St.1923, p. 675).

4. Automobiles ⇐257

Municipality is not required by statute to maintain highway so as to insure freedom of accidents at every possible speed, since it has same right as individual to assume that motoring public will obey law, and therefore will moderate its speed in passing through residence district (St.1923, p. 675).

5. Automobiles ⇐261

Where saucer-shaped dip for passage of storm waters in street in area designated by municipality by authority of statutes as residential district was safe for automobiles traversing it up to speeds of 30 or 35 miles per hour, municipality met requirements of statutory duty to traveling public so as to be free from liability for injury to guest in automobile who was injured when automobile crossed dip (St.1935, p. 99, § 90; St. 1929, p. 510, § 25½(b); St.1923, p. 675).

6. Automobiles ⇐282

In action by guest against city for injuries sustained when thrown off rear seat as automobile crossed dip in street in residence district, which was safe for automobiles traversing it up to speeds of 30 or 35 miles an hour, negligence of motorist *held* sole proximate cause of guest's injuries, and hence city was not liable (St.1935, p. 99, § 90; St.1929, p. 510, § 25½(b); St.1923, p. 675).

In Bank.

Appeal from Superior Court, San Diego County; Vaughn M. Thompson, Judge.

Action by Ada J. Rodkey against the City of Escondido, a municipal corporation. From a judgment in favor of the plaintiff, the defendant appeals.

Reversed.

For prior opinion, see 60 P.(2d) 479.

A. L. Hubbell, of Escondido, for appellant.

Renwick Thompson and Fred Kunzel, both of San Diego, for respondent.

SHENK, Justice.

The plaintiff sued the City of Escondido for damages for personal injuries She was bounced from the back seat to the top of a sedan automobile in which she was riding and suffered an injury to her back. The jolt to the vehicle occurred while it was being driven in the daytime over a surface storm drain at the intersection of Fig street and Grand avenue in said city, on December 26, 1934.

The trial court found that the maintenance by the city of the storm drain was negligence which was the proximate cause of the injury and entered judgment for the plaintiff in the sum of $5,547.50. The defendant has appealed.

The automobile was being driven by the plaintiff's grandson in an easterly direction on Grand avenue towards its inter-

section with Fig street. There were six persons in the car, three in each seat. The trial court found that the car was being driven at a speed in excess of 25 miles an hour. It also found that the construction of the storm drain was such that it was not likely to be dangerous to automobiles being driven at a speed of 25 miles an hour. The area which the occupants were traversing was signposted as a residence district, and the vehicular speed limited therein was 25 miles an hour.

The drain was constructed as a saucer-shaped dip to permit the passage of storm waters from Fig street across Grand avenue. It was sixteen feet wide and graduated to a depth of 6 inches. It was visible to occupants of cars coming from a westerly direction for a distance of 125 feet. It had existed in the same condition for about three years except that for some time prior to the accident involved herein the road surface had sunk half to three-quarters of an inch at its easterly connection with the dip. This defect was not visible to ordinary vision. The court found that the city had had both actual and constructive notice of the dangerous condition of the surface drain.

[1] The sufficiency of the evidence that the city council had either actual or constructive notice of any dangerous character of the storm drain might be and in fact is seriously questioned. There was no evidence that any injury had occurred to any one in the three years of the existence of the storm drain prior to the date hereinabove mentioned, although during that time some 400,000 automobiles had passed over its surface. The court itself held the view that a saucer-shaped dip of the dimensions stated was not ordinarily dangerous to motor vehicular traffic. The mere existence of the minor defect caused by the slight sinking of the contiguous surface of the roadway was not alone sufficient to charge the city with constructive notice. Nicholson v. City of Los Angeles, 5 Cal.(2d) 361, 54 P.(2d) 725. There was no evidence that the city council had actual knowledge of that defect.

However, if we assume that the evidence was sufficient to place the city on notice that the drain was so constructed as to be dangerous to automobiles traveling over it at a speed in excess of 25 miles an hour, we still must consider the crucial question whether under the particular facts the city was bound to maintain the street in a condition to be absolutely safe for travel thereover at higher speeds. Evidence was introduced as to the number of business and residence structures fronting on the highway which was designated and signposted by the city as a residence district. The California Vehicle Act in effect at the time involved (St.1929, p. 510, § 28½(b) defined a "residence district" as the "territory contiguous to a public highway * * * when the property fronting on one side of said highway for a distance of at least a quarter of a mile is occupied by thirteen or more separate dwelling houses or business structures, or where the property fronting on both sides collectively of said highway for at least a quarter of a mile is occupied by sixteen or more separate dwelling houses or business structures."

[2] It appears to be the contention of the respondent that if the highway traversing the district is longer than one-quarter of a mile—in this instance it was six-tenths of a mile—the same ratio must be maintained throughout the length of the highway to constitute it a residence district. However, the language of the 1929 statute contemplated that a residence district might front on a highway for a distance greater than one-quarter of a mile and that but one-quarter mile of the residence district should contain the density of structures specified. If this condition obtained the speed of vehicular traffic through the length of highway traversing the entire district could be so restricted. This was the law at the time of the accident. What change was effected by the 1935 statute (Stats. 1935, pp. 93, 99, § 90), by the omission of the words "at least" and providing for the same ratio to the length of the highway, should not color or control the otherwise plain meaning of the act as it read in 1929. Both the photographic and the numerical evidence in the record before us indicate that the city was within its rights in designating the area as a residence district. There is nothing in the cases of Cunningham v. Cox, 126 Cal.App. 685, 15 P.(2d) 169, or Adrian v. Guyette, 14 Cal.App.(2d) 493, 58 P.(2d) 988, relied upon by the plaintiff, which is inconsistent with this conclusion.

[3-6] A municipality is not bound to maintain its highways in a condition to

preclude the possibility of injury or accident. It is not an insurer of the safety of travelers on its streets. The duty imposed upon it under the statute of 1923 (Stats. 1923, p. 675) is to exercise ordinary care to maintain its streets in a reasonably safe condition for their use in a proper manner. Nicholson v. City of Los Angeles, supra; Waldorf v. City of Alhambra, 6 Cal.App.(2d) 522, 45 P.(2d) 207; Beeson v. City of Los Angeles, 115 Cal.App. 122, 300 P. 993; Brooks v. City of Monterey, 106 Cal.App. 649, 290 P. 540. It is not required to maintain the highway so as to insure freedom from accidents at every possible speed. The city has the same right as an individual to assume that the motoring public will obey the law and therefore will moderate its speed in passing through a residence district. The record shows, and the findings do not negative the showing, that the storm dip was safe for cars traversing it up to speeds of thirty or thirty-five miles an hour. Under the particular facts we must conclude that the city has met the requirements of its duty to the traveling public. Negligence on its part is not therefore shown. In such a case the question whether any negligence of the driver of the car is imputable to the plaintiff cannot affect the result. If the driver had been proceeding with due caution he would have been aware of the nature of the district and of the construction of the highway and if he had restricted his speed accordingly no untoward result would have ensued. Under the circumstances presented on this record his negligence must be deemed the sole proximate cause of the injury to the plaintiff and the city cannot be held liable. Waldorf v. City of Alhambra, supra. Comparison of the facts here with those involved in the case of Uttley v. City of Santa Ana, 136 Cal.App. 23, 28 P.(2d) 377, cannot avail the plaintiff. The question whether the maintenance of the highway in its condition at the time of any accident is negligence, is a question to be decided upon the particular facts of each case. Negligence in the present case was not shown.

For the foregoing reasons the judgment should be, and it is hereby, reversed.

We concur: THOMPSON, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.

8 Cal.2d 700

BAIRD v. OCEQUEDA et ux.

S. F. 15677.

Supreme Court of California.

May 13, 1937.

1. Mechanics' liens ⇐281(1)

In proceeding to foreclose a materialman's lien, evidence *held* not to show that materialman had waived his lien and consented to look to special fund procured by property owners upon execution of a trust deed in favor of a third party.

2. Mechanics' liens ⇐132(4)

Where last item of material furnished by materialman was furnished on May 21, building was completed early in July, and no notice of completion or cessation of labor was recorded by property owners, materialman's claim of lien which was recorded on August 16 *held* timely filed (Code Civ. Proc. § 1187).

3. Mechanics' liens ⇐134

Materialman's claim of lien which contained a statement of the demand, name of owner, a general statement of kind of materials furnished, and to whom furnished, and a description of property, *held* sufficient (Code Civ.Proc. § 1183 et seq.).

4. Pleading ⇐248(17)

Where claim of materialman's lien and complaint to foreclose as originally filed alleged that materials were furnished for "contract price" therein mentioned, amendment to complaint alleging the "reasonable value" of materials furnished *held* properly permitted, since amendment was not the substitution of a new cause of action, but merely a different statement of same cause of action.

5. Mechanics' liens ⇐291(5)

In action to foreclose materialman's lien, finding that allegations of complaint as amended, seeking recovery of "reasonable value" of materials furnished, were true *held* not to preclude judgment foreclosing lien, even if effect of finding was to permit materialman to recover on asserted inconsistent theories of express and implied contract, where there was evidence to support a recovery on either theory, notwithstanding claim of lien was based solely on an express contract (Code Civ.Proc. § 1187).

6. Mechanics' liens ⇐142

Lien claimant need not state in his claim of lien the terms, time given, and conditions of his contract (Code Civ.Proc. § 1187).

In Bank.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by F. L. Baird against Alejandro Ocequeda and wife to foreclose a materialman's lien. From an adverse judgment, the defendants appeal.

Affirmed.

Hutchinson & Green, of San Francisco (J. Albert Hutchinson, of San Francisco, of counsel), for appellants.

James T. O'Keefe and James T. O'Keefe, Jr., both of Redwood City, and Alfred J. Harwood, of San Francisco, for respondent.

PER CURIAM.

Defendants appeal from a decree foreclosing a materialman's lien in the sum of $1,332.97, including interest and costs. We shall not undertake to separately state and discuss all of the contentions urged on appeal. They run the gamut of objections. Defendants challenge the existence of any lien, the amount of the lien, the timeliness of the filing of the claim of lien, the sufficiency of the complaint to state a cause of action, the propriety of an order permitting amendment of the complaint, the propriety of asserted inconsistent allegations of the complaint as amended, the asserted inconsistency between the claim of lien and the allegations of the complaint, the propriety of the orders of the trial court overruling defendants' demurrer to the complaint and denying their motion for nonsuit, the sufficiency of the evidence to support any lien or, at least, a lien in the amount found by the trial court, the sufficiency and consistency of the findings to support the judgment, the sufficiency of the findings to support the conclusions of law, and the propriety of the judgment.

[1] Our examination of the transcript discloses nothing that requires a reversal of the judgment. The evidence is indisputable that plaintiff furnished materials used in the construction of defendants' home for which the lien was given and foreclosed. His testimony and his accounts support a lien in the amount decreed by the trial court. Plaintiff's explanation of the purpose and disposition made of a certain fund procured by defendants upon the execution of a trust deed in favor of a third party, satisfied the court below that the portion of said fund which came into plaintiff's hands was intended to be used and actually was employed to pay artisans and to discharge a balance for materials furnished by plaintiff prior to the furnishing of the materials for which judgment was given. To insure priority of said trust deed and thus aid defendants in procuring financial assistance, plaintiff merely guaranteed the lender against liens being filed by others. In view of this, there is no merit in the contention that plaintiff had waived or abandoned his lien and was satisfied to look to this special fund for payment of the materials for which the lien was foreclosed.

[2, 3] It appears that the last item of material was furnished by plaintiff on May 21, 1932. The building was not completed until early in July, 1932, and no notice of completion or cessation of labor was recorded by defendants. The claim of lien was recorded on August 16, 1932, less than ninety days after the furnishing of the last item of material and slightly in excess of one month after the completion of the building. The claim of lien was therefore filed within time. Section 1187, Code Civ.Proc. In passing, it should be mentioned that the claim of lien sufficiently met the requirements of the statute (Code Civ.Proc. § 1183 et seq.) in that it contained a statement of the demand, the name of the owner, a general statement of the kind of materials furnished, and to whom furnished, and a description of the property. This is adequate under the authorities. The complaint, filed within a month after the filing of the claim of lien, generally refers to the same matters and by reference incorporates the claim of lien, which was admitted in evidence without objection.

[4] The claim of lien and the complaint as originally filed alleged that the materials were furnished for the "contract price" therein mentioned. Upon the conclusion of the trial, the court below permitted plaintiff to amend his complaint to also allege the "reasonable value" of materials furnished. Contrary to defendants' contention, this did not constitute the substitution of a new and different cause of action. It merely represents a different statement of the same cause of action, viz., a cause of action to foreclose a materialman's lien,

and it was within the discretion of the trial court to permit the amendment. Cox v. McLaughlin, 76 Cal. 60, 18 P. 100, 9 Am.St.Rep. 164; Merchants' Collection Agency v. Gopcevic, 23 Cal.App. 216, 137 P. 609.

[5, 6] The trial court found all of the allegations of the complaint as amended to be true. Defendants urge that the effect of this is to permit plaintiff to recover on asserted inconsistent theories of express and implied contract. Even if this be conceded, it is not fatal to the judgment. Examination of the record discloses that there is evidence to support a recovery on either theory. This being so, the findings on the inconsistent theory may be disregarded as surplusage. Epstein v. Gradowitz, 76 Cal. App. 29, 31, 243 P. 877. It is immaterial that the claim of lien is based solely on an express contract, for under section 1187, supra, as it now reads, it is not necessary for the lien claimant to state in the claim of lien "the terms, time given and conditions of his contract." The quoted provision has been deleted from the section for many years and cases decided under the law as it formerly read are not in point.

From what has been said, it follows that we entertain no doubt as to the propriety of the orders overruling the demurrer to the complaint and denying defendants' motion for a nonsuit. Other points urged for a reversal have been examined and found devoid of merit. They do not call for discussion here.

The judgment is affirmed.



21 Cal.App.2d 1

KOYOKO NISHI et al. v. DOWNING et al.

Civ. 10502.

District Court of Appeal, First District, Division 2, California.

May 11, 1937.

1. Trusts ⇐136½

Property held in trust cannot be subjected to payment of trustee's debts.

2. Trusts ⇐88

Under statute providing that trust may be created only by instruments in writing or by operation of law, parol evidence that consideration for transfer of realty was paid by third party *held* admissible to show that transferee became resulting trustee for such third party under statute (Civ.Code, §§ 852, 853).

3. Trusts ⇐89(2)

Where alien's agent purchased property for benefit of alien's children, giving agent's note for purchase price though alien furnished actual cash paid, finding that agent did not furnish any part of consideration and therefore was resulting trustee under statute *held* authorized in absence of evidence that agent had personal credit which he lent as consideration (Civ.Code, § 853).

4. Aliens ⇐6(2)

State alone may challenge trust on ground that trust was created by ineligible alien.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by Koyoko Nishi and Miyoko Nishi, by K. Nishi, their guardian ad litem, against Virginia S. Downing, administratrix of the estate of Joseph Sanford, deceased, and others. From a judgment for plaintiff, defendant Downing appeals on bill of exception.

Affirmed.

S. C. Schaefer and Peebles Shoaff, both of Los Angeles, for appellant.

J. Marion Wright, of Los Angeles, for respondents.

NOURSE, Presiding Justice.

The plaintiffs are the minor children of K. Nishi, who appears herein as their guardian ad litem, and sue to quiet title to two parcels of real property. The defendants, claim under a lien of a judgment entered against one Takeyama, the record holder of the property at the time an attachment was levied. Plaintiffs had judgment from which the defendant Downing appeals upon a bill of exceptions.

K. Nishi was an alien ineligible to acquire this class of property. Takeyama was an American citizen experienced in the purchase and sale of real property. K. Nishi desired to purchase the property for the benefit of his minor children, who as minors were unable to take title in their own names, and Takeyama agreed to act as agent for these parties to bring about the desired re-

sult. For this purpose, transfers were made in the name of Takeyama, down payments were made by K. Nishi, and two deeds of trust were executed by Takeyama to cover the balance of the purchase price. These called for installment payments, all of which were made by K. Nishi by checks drawn by him to Takeyama, who immediately paid the same amount by his own check to the grantors. No payments were made by Takeyama at any time from his own funds and no consideration passed from him to the grantors, except that which might have arisen from the promissory notes which he executed at the time of the purchase. Takeyama was sued on an obligation unrelated to this transaction, and a judgment was obtained against him in the sum of $2,062.75. Execution was issued, but restrained in this proceeding. Pending the trial of that action, Takeyama transferred all his interest in the property to these plaintiffs. K. Nishi had paid $1,800 in cash at the time of the original purchase and installments aggregating $2,000, leaving a balance of $2,300 due. The plaintiffs had taken immediate possession at the time of the sale, and had erected improvements upon the land so that at the time of the trial the property was found to have a value of $20,000.

[1] Though several points are advanced in the briefs, the controlling question is whether the creditors may take property standing in the name of the judgment debtor which he holds merely as trustee for another. That such property cannot be subjected to the payment of the debts of the trustee is settled by unquestioned authority. 25 Cal.Jur. p. 212; Murphy v. Clayton, 113 Cal. 153, 45 P. 267.

[2] Objection is also made to the use of parol evidence to show the existence of the trust, the appellants arguing that a trust in real property can be created only by an instrument in writing within the provisions of section 852 of the Civil Code. But, by the same section, such a trust may be created "by operation of law," and section 853 declares that a trust results "when a transfer of real property is made to one person, and the consideration therefor is paid by or for another." It is such a trust that respondents contend for here. The parol evidence was not received to create the trust but to prove its existence. If such evidence were not admissible, there would be no need for the third subdivision of section 852, nor for the provisions of section 853, because, if the trust can be created by an instrument in writing only, the so-called resulting trust would be found in the instrument itself and would not arise from the conditions mentioned in section 853. This principle is approved to the extent that parol evidence is admissible to prove the existence of a resulting trust in Polk v. Boggs, 122 Cal. 114, 116, 54 P. 536.

[3] Appellants criticize the finding that Takeyama "did not pay any money, purchase price or consideration of any kind of his own in the acquisition of said property." They argue that he did furnish part of the consideration when he executed the promissory notes for payment of the balance of the purchase price. These notes were secured by deeds of trust covering the properties purchased. The principal sum of the notes was $4,300; the value of the property at the time of the trial was $20,000. In support of the finding, the inference could have been drawn that the notes were not taken as a part of the consideration; that the security of the trust deed was deemed sufficient; and that Takeyama did not lend any credit as consideration for the purchase. There is no evidence that he had any credit to lend as consideration.

[4] Appellants attack the judgment on the ground that the trust was created by an ineligible alien in disregard of the alien land law. This ground is not available to them. If the transaction offended the alien statute, that was the exclusive concern of the state, and the state alone could challenge it. Shiba v. Chikuda, 214 Cal. 786, 7 P.(2d) 1011; Hart v. Kanaye Nagasawa, 218 Cal. 685, 696, 24 P.(2d) 815.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

ARAIS v. KALENSNIKOFF.*

Civ. 11290.

District Court of Appeal, Second District, Division 2, California.

May 5, 1937.

Hearing Granted by Supreme Court July 1, 1937.

1. Evidence ⇐5(1), 9

Courts will take judicial notice of all matters of science and common knowledge (Code Civ.Proc. § 1875, subd. 8).

2. Evidence ⇐51

Court may resort to appropriate books and documents of reference for aid in determining matters of science (Code Civ.Proc. § 1875).

3. Appeal and error ⇐1011(1)

It is not province of District Court of Appeal to decide disputed fact questions.

4. Appeal and error ⇐931(1), 995

Appellate court must give plaintiff benefit of all favorable inferences from her testimony and that of other witnesses on appeal from judgment for her, but is not required to believe what physical facts demonstrate to be untrue or that which is contrary to immutable physical laws.

5. Appeal and error ⇐1010(1)

Fact finding, based solely on witness' testimony contrary to scientific fact, will be set aside on appeal as not supported by substantial evidence.

6. Evidence ⇐9

Court takes judicial notice of Landsteiner Blood Groupings and results derived therefrom on test.

7. Bastards ⇐65

Court's finding in bastardy case that defendant was father of plaintiff's daughter *held* not supported by substantial evidence, in view of Landsteiner blood-grouping test showing impossibility of such relationship.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Daniela Arais, in behalf of her illegitimate daughter, Elsie Arais, against Louis Kalensnikoff. Judgment for plaintiff, and defendant appeals.

Reversed.

Roger Marchetti, of Los Angeles (Charles A. Winter, and Ed. S. Green, both of Los Angeles, of counsel), for appellant.

M. C. Spicer, of Los Angeles, for respondent.

McCOMB, Justice.

Defendant appeals from a judgment entered after trial before a court without a jury, finding him to be the father of plaintiff's illegitimate child.

The material facts are these:

Plaintiff, who is Spanish, testified through an interpreter that she had been married twice, was separated from her second husband, had not had sexual intercourse subsequent to her separation from her husband with any other man than defendant, and that he was the father of Elsie Arais, born November 22, 1932. Defendant, a Russian 70 years of age, who testified through an interpreter, denied that he had ever had sexual intercourse with plaintiff, and both he and his wife averred that he had been impotent for a number of years.

Dr. Roy W. Hammack, an eminent physician and surgeon of the city of Los Angeles, who had been appointed by the trial court with plaintiff's consent to make a Landsteiner blood-grouping test of plaintiff, defendant, and Elsie Arais, reported that Elsie Arais could not be the issue of plaintiff and defendant. The Landsteiner blood-grouping test placed the plaintiff and defendant in group O and Elsie Arais in group B. It is unquestioned that the test was fairly taken and correctly reported.

[1, 2] This is the question presented for determination:

Is there substantial evidence in the record to sustain the finding of the trial court that defendant is the father of Elsie Arais?

This question must be answered in the negative. The law is settled that courts will take judicial notice of all matters of science and common knowledge. People v. Associated Oil Co., 211 Cal. 93, 105, 294 P. 717; People v. Garcia, 1 Cal.App.(2d) Supp. 761, 765, 32 P.(2d) 445; section 1875, subd. 8, Code of Civ.Proc. Also, the court may resort for its aid in determining matters of science to appropriate books and documents of reference. Section 1875, Code of Civ.Proc.

[3-5] It is likewise settled that it is not the province of this court to decide disputed questions of fact, and we are bound to give plaintiff the benefit of all favorable inferences which may be drawn from her testimony and that of other witnesses; yet

*For subsequent opinion see 74 P.2d 1043.

we are not required to believe what physical facts demonstrate to be untrue or that which is contrary to immutable physical laws. Neilson v. Houle, 200 Cal. 726, 729, 254 P. 891; Austin v. Newton, 46 Cal.App. 493, 497, 189 P. 471; Miller v. Pennsylvania R. Co., 299 Pa. 63, 149 A. 85, 86; 4 Corpus Juris 857. Hence a finding of fact based solely upon testimony of a witness contrary to a scientific fact will be set aside by this court on appeal as not supported by substantial evidence. Coughlin v. Great Western Power Co., 183 Cal. 548, 551, 191 P. 920.

[6] Applying the foregoing rules to the instant case, we take judicial notice of the Landsteiner Blood Groupings and the results derived therefrom upon test.

[7] The Landsteiner Blood Groupings in parents and children are as follows:

(The letters signify the blood types of the respective individuals)

Groups of Parents	Groups of Children Possible	Groups of Children not Possible.
1. *O X O*	O	*A, B,* AB
2. O X A	O, A	B, AB
3. O X B	O, B	A, AB
4. A X A	O, A	B, AB
5. A X B	O, A, B, AB	****
6. B X B	O, B	A, AB
7. O X AB	A, B	O, AB
8. A X AB	A, B, AB	O
9. B X AB	A, B, AB	O
10. AB X AB	A, B, AB	O

Briefly the Landsteiner blood-grouping test operates in the following manner: There are three allelomorphic genes, A, B, and O, which determine blood groups. There is one locus for these genes in each single pair of chromosomes and at this locus only one of the three genes can occur. A and B determine the presence of the agglutinogens A and B, and O the absence of agglutinogen. In the formation of the germ cells the pairs of chromosomes separate and each germ cell contains only one of each pair and therefore only one of the three genes. From combinations of the three possible kinds of sperms with the three possible kinds of ova six different genotypes result. Genes A or B, accordingly, are dominant over O; which means that if gene A or B is present even though combined with gene O, then the individual will possess agglutinogen A or B.

The agglutinogens A and B cannot appear in the blood of a child unless present in the blood of one or both parents, since they are inherited as mendelian dominants. If either parent belongs to group AB, his or her genotype is AB, so half the germ cells will contain gene A and half gene B. Every child will therefore possess at least one A or B gene and cannot belong to genotype OO or group O. On the other hand, if either parent belongs to group O or genotype OO, all the children must possess at least one O gene, so that children of group AB are impossible.

The medical profession accepts the results of the Landsteiner blood-grouping test as conclusive evidence in cases where it shows nonpaternity; that is, when the mother of the child is known and an examination of the blood of the mother, child, and putative father discloses that a union of the mother and putative father could not have given rise to the blood grouping of the child, it is conceded that the putative father is not a parent of the child. Commonwealth v. Zammarelli, 17 Pa.Dist. & Co R. 229; Wigmore on Evidence, Supp. to Second Ed.(1923) 150; "Blood Groups and Blood Transfusion" by Alexander S. Wiener, M. D., 190 et seq.; "The Medicolegal Aspects of Blood Grouping" by I. Zieve, M. A. (Cape), M. R. C. S., L. R. C. P. (London) (Department of Social Biology, University of London, and Division of Genetics and Biometrics of Jewish Hospital in Brooklyn), American Journal of Obstetrics and Gynocology, vol. 32, 1069, 1071; "Determining Parentage" by Dr. Alexander S. Wiener, Scientific Monthly (April, 1935) 323, 329; "Forensic Application of Serologic Individuality Tests" by Karl Landsteiner, M. D., the Journal of the American Medical Association, vol. 103, No. 14,1041.

Professor Wigmore in an exhaustive dissertation on the subject says:

"But at this point comes into play the great discovery of science (emerging after many years of patient research by numerous scientists, but now accepted as correct by all), viz.: that *no particular gene A, B or O, will appear in the progeny unless it was present in one of the parents.*" Wigmore on Evidence, Supp. to Second Ed.(1923) 152.

In the case before this court Dr. Hammack, a prominent physician and surgeon of Los Angeles with wide experience in blood grouping, who was appointed by the trial court with the consent of the parties to make a blood-grouping test, reported that

the result of his tests showed the following blood groups for the respective parties:

Daniela Arais Group O
Elsie Arais Group B
L. Kalensnikoff Group O

It was established that the factors A and B cannot appear in the blood of a child unless present in one or both parents. This conforms with a universal, negative truth of heredity accepted as correct by all scientists, viz., that no particular gene A, B, or O will appear in the progeny unless it was present in one of the parents. Wigmore on Evidence, Supp. to Second Ed. (1923) 152.

It was conceded that plaintiff was the mother of Elsie Arais, who came in the gene B blood group. However, as neither plaintiff nor defendant had gene B in their blood, Elsie Arais' father could not be defendant, but must be some one else falling in the gene B blood grouping.

It therefore appears that the finding that defendant was the father of Elsie Arais was not supported by substantial evidence, since plaintiff's testimony was contrary to an immutable law of nature, of which this court takes judicial notice. Our conclusions conform to those of other appellate courts that have passed upon this question. Judge Campbell of the Supreme Court of South Dakota, in State v. Damm, 266 N.W. 667, 671, in discussing the subject says at page 671:

"We recapitulate the views hereinbefore set forth by saying that we think (1) the reliability of the blood test is universally conceded by competent scientific authorities." See, also, Commonwealth v. Zammarelli, 17 Pa.Dist. and Co.R. 229.

In passing, our research discloses that the blood-grouping test requires only a few drops of blood, is painless and in no way is prejudicial to health. Therefore, since the charge of paternity is one easy to make and very difficult to disprove, it would tend to simplify this problem, when it is presented to our courts for determination, and would be a distinct advance in the science of jurisprudence, if our state Legislature should see fit to adopt as part of our Code of Civil Procedure an amendment similar to that now existing in the states of Wisconsin and New York. The pertinent section of the Wisconsin statute is as follows:

"Whenever it shall be relevant to the prosecution or the defense in an illegitimacy action, the trial court, by order, may direct that the complainant, her child, and the defendant submit to one or more blood tests to determine whether or not the defendant can be excluded as being the father of the child. The result of the test shall be receivable in evidence, but only in cases where definite exclusion is established. The tests shall be made by duly qualified physicians, or other duly qualified persons, not to exceed three, to be appointed by the court and to be paid by the county. Such experts shall be subject to cross-examination by both parties after the court has caused them to disclose their findings to the court or to the court and jury. Whenever the court orders such blood tests to be taken and one of the parties shall refuse to submit to such test, such fact shall be disclosed upon the trial unless good cause is shown to the contrary." Chapter 351, Laws of Wis. (1935) (Approved Aug. 9, 1935; Section 166.105, Wis.Stats.(13th Ed., 1935).

For the reasons hereinbefore set forth, the judgment is reversed.

We concur: CRAIL, P. J.; WOOD, J.



21 Cal.App.2d 7

HOFFMAN et al. v. CITIZENS STATE BANK OF LONG BEACH.

Civ. 11345.

District Court of Appeal, Second District, Division 2, California.

May 12, 1937.

Rehearing Denied June 2, 1937.

Hearing Denied by Supreme Court July 9, 1937.

1. Evidence ⇐441(4)

In lessor's action for rent and for damages caused by lessee's removal of vault doors at expiration of lease permitting removal of fixtures placed on premises by lessee, trial court correctly struck lessor's testimony of conversation between lessor and prior lessee concerning ownership of vault door which had been installed by prior lessee according to terms of prior lease, where contract was later reduced to writing, since conversation was merged in written contract.

2. Appeal and error ⇐1032(1)

Criticisms of trial court's rulings presented nothing for review in absence of showing that rulings were erroneous or

wherein they were prejudicial, since reviewing court need not search through record to discover wherein trial court's action involves prejudicial error.

Appeal from Superior Court, Los Angeles County; Wilber F. Downs, Judge.

Action by Fred Hoffman and another against the Citizens State Bank of Long Beach. From a judgment for plaintiffs, and from an order denying their motion to vacate the judgment, plaintiffs appeal.

Affirmed.

Adolph B. Rosenfield, of Long Beach, for appellants.

Linnell & Linnell, of Long Beach, for respondent.

WOOD, Justice.

Plaintiffs recovered judgment against defendant bank in the sum of $2,863.08, together with interest thereon. They appeal from this judgment, contending that it should have been in a larger amount. An appeal is also taken from an order denying their motion to vacate the judgment.

Plaintiff Fred Hoffman and others were the owners of certain real property in the city of Long Beach and as such owners entered into a lease on March 20, 1923, with O. Jensen and others whereby it was provided that a building should be erected on the property, the doors for which were to be furnished and installed by the lessees. Thereafter plaintiff Fred Hoffman became the owner of the premises by virtue of a sale in partition proceedings and a lease thereof was made by him with defendant bank, which by its terms was to expire March 31, 1933. The lease provided that the lessee might remove all personal property and fixtures placed by the lessee upon the premises and in so doing leave the premises in first-class condition. The action was commenced to recover the amount of rental claimed to be unpaid according to the contract and the amount of damages claimed to have been sustained by reason of the removal of two vault doors and the failure of defendant to leave the premises in proper condition.

[1] Plaintiffs complain of the action of the court in striking out the testimony of Fred Hoffman concerning the conversation he had had with O. Jensen concerning the ownership of a vault door. The contract was later reduced to writing and the conversations were merged in it. The ruling of the court was correct.

[2] Plaintiffs criticize various rulings of the trial court, but they do not present to this court anything which shows that the rulings of the court were erroneous. Neither do they point out wherein they have been prejudiced by the rulings of the court. It is not the duty of a reviewing court to search through the record for the purpose of discovering wherein the action of the trial court in the respect complained of involved error prejudicial to the plaintiffs.

The judgment and order are affirmed.

We concur: CRAIL, P. J.; McCOMB, J.

20 Cal.App.2d 630

RILOVICH v. RAYMOND et al.

Civ. 28.

District Court of Appeal, Second District, Division 1, California.

April 30, 1937.

Hearing Denied by Supreme Court June 28, 1937.

1. Waters and water courses ⇐158(3)

Under vendor's contract to supply water from land retained from system of pipes "as now constructed and maintained," purchaser *held* not entitled to damages for failure of vendor's successors to furnish water from well below land granted in addition to water from upper well and surface water, where water from lower well was not raised to level of land granted until after grant, notwithstanding that supply exclusive of water from lower well was inadequate, and notwithstanding voluntary delivery of water from lower well 10 or 12 years after grant.

2. Evidence ⇐441(8)

Frauds, statute of ⇐158(2)

In purchaser's action against vendor's successors for failure to deliver water from land retained, under contract, executed in connection with grant, to deliver water from system of pipes "as now constructed and maintained," purchaser's testimony as to vendor's statement before execution of grant that he would equip well to pump water to land granted which was above such well, *held* inadmissible as attempt to vary terms

of written instrument, and as relating to conveyance of realty.

3. Evidence ⇐448

Parol evidence is admitted, where uncertainty exists as to meaning of contract, to show what parties meant by what they said, but is not admitted to show that they meant something other than what they said.

4. Appeal and error ⇐1008(3)

Conclusion of trial court as to meaning of contract, erroneously reached through consideration of incompetent evidence, *held* not binding upon Court of Appeal.

5. Waters and water courses ⇐158(3)

In action for purchaser's breach of contract to furnish water from stipulated sources, plaintiff could recover only for damage caused by failure to furnish water from such sources, and neither neglect nor abandonment of such sources could be excused if water could be reasonably produced in amount which would be of substantial benefit to plaintiff.

6. Appeal and error ⇐1177(6)

In action for breach of contract to furnish water from stipulated sources, where court erroneously awarded damages for failure to furnish water from another source and made no findings and received no evidence as to how much water was available at various times from stipulated sources, which were admittedly inadequate to supply plaintiff's need, retrial was necessary to determine theoretical growth of plaintiff's nursery stock and crops if reasonably available water from stipulated sources had been supplied.

7. Damages ⇐6

Wrongdoers are not allowed to escape responsibility merely because circumstances render it extremely difficult or impossible to ascertain amount of damages with certainty, but law will give effect to reasonable probabilities of case as established by best evidence available.

8. Damages ⇐117

As between two rules for measurement of damages, either of which is adequate to show extent of damage, that will be preferred which affords better and more satisfactory means of reaching accurate and certain results.

9. Waters and water courses ⇐158½(1)

In purchaser's action for breach of contract to furnish water from stipulated sources, plaintiff could recover for value of nursery stock lost through failure of defendants to furnish water as agreed.

10. Waters and water courses ⇐158½(1)

In purchaser's action for breach of vendor's contract to furnish water from land retained from stipulated sources, measure of damages for loss of orange trees was amount of depreciation in value of land caused by damage to or loss of trees, and "restoration rule," whereby damages for loss of crops which trees might have borne would be awarded, was inapplicable, since loss of value to land through loss of trees included loss of future crops.

11. Appeal and error ⇐1178(6)

Where action had been pending for over 10 years and retrial was necessary, Court of Appeal would indicate issues to which proof should be directed upon retrial.

12. Waters and water courses ⇐158½(1)

In purchaser's action for vendor's breach of contract to furnish water from retained land from stipulated sources, plaintiff was entitled to damages for difference in value of nursery stock if available water had been furnished, for value of growing orange crops lost during time some water was furnished, for difference in value of land because of loss of orange trees, for reasonable cost of water obtained elsewhere to amount of water available from agreed sources, and for difference in rental value of plaintiff's land if available water had been furnished.

13. Waters and water courses ⇐158(2), 158½(1)

Under vendor's contract to supply water from land retained from system of pipes "as now constructed and maintained," where purchaser connected 2-inch pipe line to vendor's 4-inch line, purchaser was not limited to quantity which flowed through 2-inch line, but could use line of as large diameter as that of vendor and his successors, and could recover damages for wrongful refusal of right to construct larger connecting line.

14. Waters and water courses ⇐158½(1)

Under vendor's contract to supply water from land retained through system of pipes "as now constructed and maintained," in action for breach of such contract by vendor's successors, decree should recognize purchaser's perpetual right and easement to water from water system described in con-

tract, or as remodeled, to take water from agreed sources as they existed or were restored or reconditioned, and right to install pipe line to enable purchaser to obtain water available in accordance with contract.

Appeal from Superior Court, Ventura County; F. M. Jamison, Judge.

Action by Anton Rilovich against Mary Perkins Raymond and others. From an adverse judgment, named defendant and defendants George P. Raymond and Charles G. Raymond appeal.

Reversed, with directions.

W. G. Irving, of Riverside, Clarke & Bowker, of Los Angeles, and James C. Hollingsworth, of Ventura, for appellants.

McGee & Robnett, Daly B. Robnett, Louis Luckel, and J. L. Murphey, all of Los Angeles, for respondent.

SHINN, Justice pro tem.

In 1910, Dr. S. L. Stuart and his wife, owners of a tract of land in Ojai Valley, Ventura county, sold and conveyed 20 acres thereof to Anton Rilovich, plaintiff herein. On the same day, and as a part of the transaction, Stuart executed a written agreement reading as follows: "This agreement made and entered into this 27th day of October, A. D. 1910, by and between S. L. Stuart, the party of the first part, and Antone Rilovich, the party of the second part, Witnesseth: Whereas, the party of the first part is the proprietor of a system of water works and pipe lines for the purpose of furnishing water for the irrigation of certain lands in Section 5, T. 4 N., R. 22 W., S.B.M. and, Whereas, the party of the first part has conveyed to the party of the second part 20.00 acres of land in lot 3, Section 5, T. 4 N. R. 22 W. S.B.M. by deed of even date herewith, and intended to be forthwith recorded in the office of the County Recorder of Ventura County, State of California, Now, Therefore, this agreement witnesseth; That the party of the first part agrees to furnish the party of the second part, for the price or sum of twenty cents (20c) for each one thousand gallons of water used by said party of the second part upon the land particularly described in said deed of even date herewith. It being understood that said water is to be supplied from the system of water pipes as now constructed and maintained by the party of the first part, and that all expense in making connections to and with said system of pipes and conducting said water to said land, including all tanks, measuring devices or meters for measuring said water, shall be at the sole cost and expense of the party of the second part. And it is also understood that the party of the first part reserves the right and privilege of remodeling, changing and reconstructing said system of water pipes at his option. In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written. (Signed) S. L. Stuart (seal), (Signed) Martha A. Stuart."

The land which Stuart retained, and on which certain water sources and distributing facilities were located, was sold by him in January, 1912, and after passing through various ownerships was conveyed on the 6th day of February, 1919, to defendant George P. Raymond, who conveyed it on the 1st day of May, 1922, to defendant Mary Perkins Raymond, who conveyed it to defendant Charles G. Raymond on February 11, 1926.

Plaintiff went into possession of the land he had purchased in 1910 and from time to time improved the land by clearing a portion thereof and planting orange nursery stock and about 6 acres of orange orchard. He brought this action December 8, 1925, alleging breach by the defendants, other than Charles G. Raymond, of the contract to furnish him with water, and he sought damages therefor in the sum of $30,000. By later amendments to the complaint, Charles G. Raymond was named as a defendant and the prayer of the complaint for damages was increased to the sum of $252,234.51. The case was tried in 1934 before the court without a jury and judgment was rendered against the several defendants as follows: George P. Raymond, $6,000; Mary Perkins Raymond, $30,176; Charles G. Raymond, $17,000; and Mary Perkins Raymond and Charles G. Raymond, jointly and severally, $12,000; or a total of $65,176. The basis of these several awards was the alleged loss of nursery stock and profits that might have been realized therefrom, the loss of crops of oranges which might have been, but were not, grown in the orchard, and damage to the trees themselves. George P. Raymond, Mary Perkins Raymond, and Charles G. Raymond appeal from the judgment.

The case was before the Supreme Court upon a former appeal (Relovich v. Stuart, 211 Cal. 422, 295 P. 819). Upon that appeal the judgment which had been given in favor

of the then defendants, after an order sustaining demurrers to the complaint without leave to amend, was reversed. The Supreme Court construed the water contract as one which created in plaintiff a property right or easement to take water for irrigation from the water system on the land retained by Stuart. This right was held to be for the benefit of the land conveyed to Rilovich, and the agreement was held to be binding upon all those taking the land with notice thereof. It was also held that the agreement was not uncertain in failing to specify the quantity of water which was to be supplied for the irrigation of plaintiff's land. The court said in part: "It is obvious that the consideration paid by the plaintiff Relovich to the Stuarts supports both the conveyance of the twenty-acre tract sold by Dr. Stuart to Relovich and the agreement on the part of the grantor by which the plaintiff was given the right to enter the adjoining land of the Stuarts, make a connection with the water system thereon, and take therefrom sufficient water to irrigate the land conveyed."

The main controversy between the parties relates to the quantity of water plaintiff was entitled to and this depends upon the identity of the water supply in which plaintiff acquired an interest. The sources of the water which was being used on the Stuart land in 1910 were two wells and certain surface water, which surface water flowed during the rainy season of each year from the west fork of San Antonio creek, sometimes called Gridley canyon. The surface water ceased to flow as early as June 1st of each year and none came thereafter except from rainfall. The upper well, owned in equal interests by Stuart and one Gibson, was in the canyon above the orchards of the several parties. Water from the upper well and the creek flowed south through a 4-inch pipe line belonging to and maintained by Dr. Stuart to a small settling reservoir on the Stuart land. The lower well was located close by the reservoir. The land conveyed to Rilovich lay below the upper sources of supply but above the lower well and reservoir. It is the contention of the defendants, and has been at all times, that plaintiff acquired no right to receive water from the lower well, although they do not dispute his right to water from the upper sources when water is available. Plaintiff contends that his right to water extends also to the lower well. The trial court found in plaintiff's favor upon this question, and damages were awarded because of the breach of the supposed right of plaintiff to receive what water he needed from the lower well, which was a good well, for the irrigation of his land, whenever the supply available from the upper source was inadequate for his purposes, as was frequently the case.

The provisions of the contract which govern in the matter read as follows: "It being understood that said water is to be supplied from the system of water pipes as now constructed and maintained by the party of the first part, and that all expense in making connections to and with said system of pipes and conducting said water to said land, including all tanks, measuring devices or meters for measuring said water, shall be at the sole cost and expense of the party of the second part. And it is also understood that the party of the first part reserves the right and privilege of remodeling changing and reconstructing said system of water pipes at his option."

If the lower well was a part of the "system of water pipes as now (then) constructed and maintained" by Stuart, the trial court, of course, correctly held that plaintiff has been entitled at all times to augment the supply from the upper source with the necessary amount of water from the lower well. If the latter well was not at the time of the contract a part of the system of pipes as then "constructed and maintained" by Stuart, the trial court committed error not only in declaring plaintiff to be possessed of a right to receive water from the lower supply but also in the disposition of the issues of damages, as hereinafter set forth.

After a study of the record and the briefs, which present exhaustive argument upon all of the points in issue, we find ourselves unable to agree with the conclusions reached by the trial court.

Both from the language of the contract and the acts of the parties over a long period of years, consistent with that construction, it appears that the rights granted to plaintiff were in the water from the upper source alone. Dr. Stuart owned lands both above and below the lower well. The water was raised in the upper well by a pump and, with the surface water collected, flowed through the 4-inch pipe and was distributed over the Stuart lands by gravity. Likewise, water was pumped from the lower well and was distributed by gravity over the Stuart lands which lay below that well. The lower well and distribution system were, in 1910, and thereafter remained, except as noted hereafter, entirely independ-

ent of the system of pipes from the upper source. After purchasing his land, Rilovich laid a 2-inch pipe therefrom easterly across the intervening land and connected the same with the 4-inch line which came from the upper well. A valve was installed by means of which water could be diverted from the four-inch line into the 2-inch line. This connection was made in 1911. It was located some 900 feet north of the reservoir. It was later relocated at a point some 600 feet north of the reservoir. Through this pipe line Rilovich received his water for irrigation. His needs in the beginning were small, but with the improvement of his land they gradually increased. This water source was available and was used by him, without question, until and during the summer of 1922, although the upper well was abandoned in the summer of 1921 and has not since been used. Thereafter water came through the 4-inch line only when the creek was flowing. The surface water which flowed from the creek was available until about the first of June of each year. In 1923 defendant Mary Perkins Raymond abandoned the creek as a source of supply and the connection was not re-established until 1926, when Charles G. Raymond laid a new line around the old line in such a manner as to join with the same at a point below the 2-inch line of plaintiff. Plaintiff has received no water from defendants since 1924.

There was at all times sufficient water from the lower well to irrigate plaintiff's land, but we are of the opinion that plaintiff failed to establish any right to water from that well. We reach this conclusion after a consideration of the terms of the agreement and the circumstances and situation of the parties at the time it was entered into.

[1] All of the Stuart lands, as we have pointed out, were irrigated by gravity distribution of the water. The only pumps were those which brought the water to the surface. The only supply which could be carried to the Rilovich land, as the water system was then "constructed and maintained," was that which came from the upper source. To supply it from the lower well would have required the installation of pumping equipment capable of lifting the water from the well and elevating it some 30 feet, and a connection with the 4-inch line which ran from the reservoir to the upper well. It would have required also a pipe line sufficiently strong to withstand the pressure of the water which was lifted through it. The installation of this equipment would have materially changed the system as it existed in 1910, as well as the method by which water could be delivered to lands above the lower well. There cannot be read into the contract any obligation on the part of Stuart to remodel or add to the original system. He reserved the right to make changes in the system, but he was not obliged to do so, nor can the contract be construed as requiring Dr. Stuart at any time to change the method of delivery of water from a gravity distribution from the upper source to a distribution which would require pumping from the lower source. The provision of the agreement that water was to be furnished from the system of pipes "as now constructed and maintained" cannot be ignored. The limitation upon the rights granted to Rilovich no doubt was intended, and should be so construed, to leave the grantor free to develop and use other water supplies and other means of distribution free from any claim thereon by the grantee. Rilovich was not given the right to receive water from the wells of Stuart, but only from a supply furnished by a single system of pipes then constructed and maintained. As we have pointed out, the lower well was no part of this system. By the judgment Rilovich has been given the right to receive surface water from the canyon and from both wells on the Stuart property, and defendants Raymond have been placed under the obligation of pumping water to the Rilovich land, which had never been done prior to 1921, 11 years after the water agreement was executed. These correlative rights and burdens of the parties are far beyond those established by the agreement. It is appropriate to say here that the contract did not require Dr. Stuart to distribute water over the Rilovich lands, nor was there in its provisions a direct or implied promise to raise water to the Rilovich land in the event Dr. Stuart or his successors should, through additions to the system, pump water from their lower well to their higher lands. Moulton Irrigated Lands Co. v. Jones, 43 Cal.App. 732, 185 P. 684.

We find nothing in the conduct of the parties or the surrounding circumstances which are relied upon by respondent as having an important bearing upon the interpretation of the contract, which would justify the construction for which respondent contends. It appears to be quite probable that the amount of water which could be delivered from the upper source was inadequate to irrigate the Rilovich 20 acres dur-

ing the irrigating season and other lands for which Dr. Stuart had agreed to furnish water. If this be true, as respondent contends, it would appear that Dr. Stuart bound himself to furnish more water than he could deliver from that source, and that Rilovich contracted for more water than was available for his use from the upper source. It is argued that this would have been an unreasonable contract for the parties to make, and that, therefore, it must be considered to have been their intention that the water was to be furnished from the lower well whenever it was necessary to supplement the supply from the upper source. It does not appear that there was any understanding between Rilovich and Dr. Stuart as to how the former would improve his lands, whether he intended to set out the 20 acres to orchard or merely to conduct a nursery business. Granted, however, that Rilovich acquired the right to irrigate as much of the 20 acres as he should see fit to cultivate and improve, the fact that the parties made an improvident contract furnishes no reason for giving the agreement a construction which would alter its plain terms in material respects.

It is contended also that nearly all of the owners of the Stuart lands, commencing with Dr. Stuart, have recognized plaintiff's right to receive water from the lower well; that their conduct in this respect is entitled to consideration in the construction of the agreement, and that it tends to show that the successors of appellants understood the agreement as granting plaintiff rights in the lower well.

[2] Plaintiff was permitted to testify, over objection, that, before he purchased the land, Dr. Stuart told him that he thought he could produce more water with a larger pump, and that he would put a "booster" on the lower well and lift water to the land which plaintiff was buying. This testimony was received, we presume, upon the theory that the contract was ambiguous in failing to describe with certainty the system of water pipes from which plaintiff should receive water, and that extrinsic evidence was admissible to dispel the uncertainty. It is also contended that the claimed oral agreement of Dr. Stuart might be proved as a part of the contract because it related to a collateral matter and one which the written agreement did not purport to cover, but this position is obviously untenable. The evidence was not addressed to a feature of the agreement which was collateral to those set forth in the writing, nor to a matter inadvertently omitted therefrom. It went to the very heart of the subject matter of the agreement. The testimony, in our opinion, should have been excluded. There was no uncertainty in the language which described the water system from which plaintiff was to receive water as, "the system of pipes as now constructed and maintained," unless the word "maintained" should be construed as including the manner of use of the system at that time. There can be no doubt that plaintiff was to receive water from the 4-inch line which took water from above his land. There was no pump in that system designed to carry water to higher land and no connection between the 4-inch line and the lower well. No attempt was made to show that the lower well had ever been used as a part of the upper system. When water was later carried to the upper lands from the lower well, it was with a heavier pump and a reconstructed pipe line. The testimony did not explain anything and the only purpose it could have served was to attempt to vary the terms of the written instrument by adding to the obligations of Dr. Stuart in a most material respect. Furthermore, the subject matter of the contract was an interest in real property, which could be transferred only by written instrument. Yet the oral promise, antedating the written agreement, has been accorded full effect by the findings and judgment, as fully as if it had been carried into the writing.

[3, 4] The case does not fall at all within the reasoning of the authorities which allow the introduction of extrinsic evidence to identify the subject matter of a contract or deed. Rather it falls within that class of cases which holds that evidence of oral negotiations preceding the execution of a written contract may not be received to contradict, add to, or vary the terms of the writing. Under the guise of aiding in the interpretation of the contract, the oral agreement has been given such effect that the contract has been altered, so that instead of the right being limited to the system as then "constructed and maintained," it is made to apply to that system, plus heavier pumping equipment, a pipe connection between the well and the 4-inch line, a re-enforcement or rebuilding of that line to carry the pressure of the water lift, and a booster to lift the water. Thus a gravity system has been converted into a force system. And all of this has been done upon the theory that it is permissible as an inter-

pretation of the expressed intention of the parties. Parol evidence is admitted where uncertainty exists as to the meaning of a contract to show what the parties meant by what they said, but it is not admitted to show that they meant something other than what they said. United Iron Works v. Outer H., etc., Co., 168 Cal. 81, 141 P. 914. The conclusion of the trial court as to the meaning of the contract, erroneously reached through a consideration of this incompetent evidence, is not binding upon this court.

Plaintiff testified that Dr. Stuart in 1911 paid for an irrigation of plaintiff's land from the Fordyce well, which belonged to an adjoining owner, and also that subsequent owners of the Stuart land occasionally paid for water which plaintiff obtained from adjoining owners between the years 1911 and 1919. He contends also that defendants George P. Raymond and Mary Perkins Raymond recognized his right to water from the lower well, and these alleged admissions are urged in support of plaintiff's construction of the agreement. We think this evidence was entitled to slight consideration. Those who owned the property prior to 1919 never furnished plaintiff with any water from the lower well, nor did he demand it of them, nor did he install or offer to install a pump, or to pay for the pumping, which he would have been required to do under the contract had he been permitted to use water from the lower well. His right to receive water from the upper source in an amount sufficient for his needs was superior to the rights of the owners of the Stuart lands to use the same water, since the contract was binding upon all of them. They all used water from the upper source, and they evidently used it when plaintiff himself was in need of it and there was not enough for both. When, therefore, the several owners assisted plaintiff in getting irrigation water elsewhere, their conduct in so doing, if it be conceded that such conduct was proved, only tended to show that they felt themselves under obligation to provide plaintiff with more water than he was receiving. This would be quite natural if they were using any of the water from the upper source during any of the times when it was needed on plaintiff's land. It appears that the right of Rilovich to receive water from the lower well was not at any time admitted by any of those who owned the Stuart lands prior to 1919 when George P. Raymond acquired them.

In the summer of 1921, George P. Raymond, having abandoned the upper well, was in need of water for trees on what was known as the Horn property, which adjoined the Rilovich land on the east. To accomplish this he put in a larger pump and "booster" at the lower well which would raise the water to the Horn property. He also rebuilt the 4-inch line up to the northeast corner of the Horn property and, by the use of a tractor belted to the pump, raised water through the pipe line to the northeast corner of the Horn property, which was some 30 feet higher than the well. The excess or "spill" water from the irrigation flowed across the Horn property into a sump adjoining the Rilovich property. With the consent of Raymond this excess water was used by plaintiff in the summer of 1921. A portion of the water pumped up through the 4-inch line went above the lateral leading to the Horn land, and found its way into the Rilovich 2-inch line, and the latter had the use of it for irrigation. During the spring of the year 1921 and of 1922, surface water came from the canyon through the 4-inch pipe line and was available for the use of Rilovich, and it appears that he used the water during those periods. During the summer of 1922, Rilovich received the excess water from the irrigation of the Horn tract and also some water which was pumped up by George P. Raymond through the 4-inch line. The evidence was that no charge was made to Rilovich for the water thus furnished. None of the appellants Raymond ever conceded that plaintiff was entitled to water from the lower well. When they furnished him with such water it was with the express declaration that they did so as a matter of accommodation and not because of his right. Had they conceded him the right he now claims, there would have been no lawsuit. Nor is it reasonable to consider the occasional acts of the parties as late as 10 or 12 years after the contract was executed as having a bearing upon the intentions and understandings of Rilovich and Dr. Stuart at the time the contract was made.

[5] We have now to consider questions relating to damages. As the contract was construed by the Supreme Court on the former appeal, the amount of water which plaintiff bought was to be measured by his needs for irrigation. The obligations of the several defendants and of the former owners of the sources of supply would have been satisfied when plaintiff had received all of the available supply from the upper

source at times when he needed it. If appellants failed or refused to furnish water from that source, which was available at times when Rilovich needed it, they failed to meet their obligations under the contract and became liable to plaintiff for the consequent damages. Therefore, the amounts recoverable by plaintiff should have been limited to such damages as were sustained by plaintiff by reason of the failure of appellants to furnish, from the upper source, all of the water which plaintiff needed for irrigation up to the full capacity of that source. Neither neglect nor abandonment of the upper well or sources of surface water by appellants could be excused as long as it was reasonably possible to produce water therefrom in amounts sufficient to be of substantial benefit to plaintiff.

[6] Damages were allowed by the trial court as against each defendant upon the theory that there was an abundance of water at all times, to which plaintiff was entitled. It is manifestly impossible to sustain the judgment for damages either in whole or in part under the construction which we give the contract. The evidence is not such as to allow this court to direct findings which would be sufficient. There is no way by which we can determine how much water was available or when it was available from the upper source during the years when those sources were used, nor how much was withheld from plaintiff when he needed it. No attempt was made to prove the capacity of the upper water sources subsequent to 1921. The upper well, as we have stated, was abandoned in 1921. Defendant Charles G. Raymond made a test of the well at that time and did not succeed in pumping any substantial amount of water. It is his contention that the well failed completely in that year and that he was unable to supply any water from it thereafter. There is no evidence that the well could have produced water in commercial quantities in the summer of 1921 or at any later time. The significance of this fact in the determination of damages is obvious, in view of the fact that plaintiff's right to water was limited to the upper supply.

The court found that in the years 1919, 1920, and 1921, plaintiff was damaged to the extent of $6,000 on account of the loss of seedbed and nursery stock, for which amount judgment was given against defendant George P. Raymond; that in 1924 plaintiff had 30,000 seedbed and 25,000 nursery stock; that 54,000 of these trees would have been grown successfully and would have been sold between 1924 and 1930 at an average price of $1.59 per tree; that in 1924 plaintiff's trees would have produced four orchard boxes per tree and each year thereafter one more orchard box per tree until 1930, when each tree would have been producing ten orchard boxes. The net value of these orange crops, which were never grown, was allowed as damages. Against Mary Perkins Raymond, who owned the property from 1922 to 1926, judgment was given for $30,176, for loss of orange crops and nursery stock. Judgment was given against Charles G. Raymond, who acquired the property in 1926, in the sum of $17,000 for loss of crops and nursery stock. Plaintiff was awarded $12,000 against Mary Perkins Raymond and Charles G. Raymond, jointly and severally, for what would have been the cost of replanting the orange orchard and bringing the trees to the age they had as of the time they were found to have become valueless, which was sometime between 1922 and 1929, together with the value of crops which might have been raised during the time required to restore the orchard.

Appellants have much to say about the speculative character of the proof of damages, and there is merit in their contentions. There was none but the most theoretical and speculative evidence of the productivity of orange trees on the Rilovich property, especially that relating to the estimated yearly increase in bearing capacity. There was a great discrepancy in the producing capacity of adjoining groves, and there was evidence that the orange land in the vicinity was spotted and far from uniform, so far as soil conditions were concerned. However, it is not necessary to discuss the sufficiency of the facts in evidence to support the findings of the court as to the future value of the nursery stocks or theoretical crops that might have been raised if the water supply had been adequate. The whole case, as we have stated, was decided upon the basis that there was ample water at all times to irrigate the Rilovich land. It is tacitly conceded by the parties that the water supply from the upper source was inadequate for that purpose, except possibly when plaintiff's needs were small. The extent of the deficiency was not shown by the proof, nor did the court attempt to make a finding with reference thereto. Were the same theories attempted to be used upon a retrial of the case, it would be necessary for the court to receive evidence as to the

theoretical growth of nursery stock and the growth of crops of oranges over a long period of years and the extent and value of the nursery stock and crops from year to year, all in view of the fact that it is doubtful in the extreme that there would have been a sufficient amount of water for irrigation even though plaintiff had received all water available from the upper well. The theories of damages applied by the court as to the several claims of damages were not proper under the facts of the case and as they will have to be developed upon another trial.

[7,8] We recognize the rule that wrongdoers are not allowed to escape responsibility in damages for their acts merely because the circumstances are such as to render it extremely difficult or impossible to ascertain the amount of damage with certainty. The law does not require absolute certainty, but gives effect to the reasonable probabilities of the case as established by the best evidence which is available. Hacker Pipe & Supply Co. v. Chapman Valve Mfg. Co. (Cal.App.) 61 P.(2d) 944. Purely speculative profits are never allowed. Crow v. San Joaquin, etc., Irr. Co., 130 Cal. 309, 62 P. 562, 1058. It is needless to say that as between two rules for the measurement of damages, either of which is adequate to show the extent of the damage, that one will be preferred which affords the better and more satisfactory means of reaching an accurate and certain result.

Under the construction which we have placed upon the contract by which plaintiff's water right was created, plaintiff's damage, if he suffered recoverable damage, may be established adequately and with reasonable certainty and under definite and well-established principles of law. There is no need for speculation or conjecture.

[9] It may not be questioned that plaintiff is entitled to damages equal to the value of his nursery stock lost in whole or in part through the failure of defendants to furnish water as agreed.

[10] The proper measure of damages for the loss of plaintiff's orange trees exclusive of the nursery stock, is well settled in this state. Plaintiff's trees were a part of his land. Damage to the trees was damage to the land. The measure of the damage was the amount of depreciation in the value of the land caused by the loss of or damage to the trees. Shearer v. Park Nursery Co., 103 Cal. 415, 37 P. 412, 42 Am.St.Rep. 125; Kolberg v. Sherwin-Williams Co., 93 Cal. App. 609, 269 P. 975; Chipman v. Hibberd, 6 Cal. 162; Montgomery v. Locke, 72 Cal. 75, 13 P. 401; Hill v. Morrison, 88 Cal. App. 405, 263 P. 573; LeBrun v. Richards, 210 Cal. 308, 291 P. 825, 72 A.L.R. 336; Perkins v. Blauth, 163 Cal. 782, 127 P. 50; Crum v. Mt. Shasta Power Corp., 117 Cal. App. 586, 4 P.(2d) 564; Sutherland on Damages (4th Ed.) § 1019. Where damages are proved and allowed on the above basis, there is no warrant for allowing further damage for the loss of crops which the trees might have borne in the future if they had not been destroyed. An allowance of damages upon the above basis on account of trees wholly or partially destroyed would necessarily include all of the proper elements of damage under that branch of the issue of damages. The value which bearing orange trees add to land is based upon the value of crops which they might bear. When the loss of the tree is compensated in damages to the full value, the value takes the place of the tree and there will be no future crops to consider.

Respondent successfully contended before the trial court that the proper measure of damages to the trees themselves was the cost of restoration of the trees, plus the value of crops that would have been grown, during the time that was lost, had the trees not been destroyed, and damages were allowed against Mary Perkins Raymond and Charles G. Raymond, jointly, for the sum of $12,000 upon that basis. In support of the application of this rule respondent cites Lowe v. Yolo County, etc., Water Co., 157 Cal. 503, 108 P. 297, and Miller & Lux, Inc. v. Pinnelli, 84 Cal.App. 42, 257 P. 573. These were cases which involved injury to and partial destruction of crops of alfalfa or pasturage resulting from deprivation of water or from damage done by straying cattle. It was recognized in these cases that, in addition to an allowance for the value of crops destroyed, damages might be awarded for the cost of reseeding the plants, the roots of which had been destroyed, and that the value of the crops that would have been grown during the period of reseeding and growth was allowable as the equivalent of the rental value of the land during that period. Appellants do not question that the true measure of damages in case of partial destruction of alfalfa or meadow grass was applied in the cases cited. They contend that the rules have no application to the destruction in whole or in part of orchard trees such as those belonging to plaintiff. In this contention they are undoubtedly

correct. The rule of damages in such case is as we have stated it, namely, the depreciation in the value of the land, and this is exclusive of every other kind of damage to the trees themselves. Respondent suggests that both rules are applicable, and that he may rely upon either. We see a vast difference, however, between the restoration of a part of an established crop of alfalfa, which can be accomplished readily and with a fair measure of certainty, and the restoration of such an orange grove as the one involved in the present case. We have heretofore sufficiently pointed out the difficulties in the application of the restoration rule to show that it cannot be applied to the facts in evidence.

[11] This action has been pending for more than 10 years and, inasmuch as a retrial is necessary, we deem it advisable to indicate the issues to which, in our opinion, the proof should be directed upon a retrial.

[12] The court should determine the values which the nursery stock and seed stock would have had from time to time if defendants had furnished plaintiff with all available water from the upper source as he needed it; the excess, if any, of such values, over the values the nursery stock had with the water that was actually furnished, should be taken as plaintiff's damage to the nursery stock. The entire damage to nursery stock should be fixed as of dates not later than the time when defendants ceased to furnish water altogether. No allowance should be made on the basis of lost profits after that time. If plaintiff lost growing orange crops in whole or in part because of the failure of any of the defendants to furnish water which was available from the upper source when plaintiff needed it, he may recover the value of the crops lost. This proof should not extend beyond the time when defendants ceased to furnish water, nor beyond the date with relation to which damage to the land is fixed.

Plaintiff is entitled to damages in the amount of the excess, if any, of the value of his land with the orange trees growing thereon in the condition they would have been in if, at all times, plaintiff had been furnished, as needed, with all of the water which was available from the upper source, above the value of the land with the trees in their actual condition. If the proof fails to show with reasonable certainty that the upper water supply would have produced sufficient water to prevent further deterioration in the trees after June, 1921, the damage to the land on account of loss or deterioration of the trees should be fixed as of that date. Plaintiff is also entitled to damages in the amount of the reasonable cost (exclusive of capital cost) of irrigating water which he obtained elsewhere after defendants ceased to furnish water altogether, provided, however, that the amount of damage on this account should be limited to the cost of acquiring that quantity of water which he would have received during the same period if the defendants had complied with their contract to furnish water. Plaintiff is entitled to recover the excess of the rental value of his land with the water that was available from the upper source, above the rental value of the land with such water as plaintiff used thereon, during that period when defendants failed to furnish any water. Damages on account of loss of rental value should not be based on the value of crops of oranges or nursery stock which might have been grown and sold during that period.

In the trial of these issues as to damages, the time when defendants ceased to furnish plaintiff with water should be taken as the time when they ceased to furnish water from the upper source. The capacity of the upper source (and by that is meant both the well and the surface water supply) is to be determined upon the hypothesis that defendants had used all reasonable means to take the greatest available amount of water therefrom for plaintiff's use.

[13] The water that plaintiff had a right to use was not limited to the quantity which would have flowed through his 2-inch pipe line. He had a right to take all of the water from the defendants' 4-inch line when he needed it. He had a right to use a pipe line of as large diameter as that of the defendants. If he did not choose to increase the capacity of his line, defendants cannot be held to responsibility for his failure to receive the additional water which he might have obtained with a line of greater capacity; if, however, he demanded and was refused the right, and was not allowed to increase the capacity, the defendant or defendants refusing the right would be responsible for the resulting damage.

[14] The decree should recognize plaintiff's perpetual right and easement to water from the water system described in the contract, or as the same has been or may be remodeled to take water from the upper sources as they existed in 1910, or as they have been or may be restored or reconditioned, together with the right to install and establish a pipe line therefrom across the

land of defendant Charles G. Raymond of sufficient size to enable him to obtain, as required, the water that may be available from the upper sources and to take water therefrom in accordance with the views expressed in this opinion, not exceeding the amount required for the irrigation of plaintiff's land, the same to be at the expense of plaintiff, as provided in the agreement.

The judgment is reversed for further proceedings in accordance with the views herein expressed.

We concur: YORK, Acting P. J.; DORAN, J.



21 Cal.App.2d 10

JAMESON v. GAVETT et al.

Civ. 2022.

District Court of Appeal, Fourth District, California.

May 12, 1937.

Appeal and error ⇐800

Where transcript was filed February 26, and motion to dismiss appeal was filed April 20, and printed brief was filed May 8, appeal would not be dismissed on ground that printed points and authorities were not filed within thirty days after filing of transcript as required by court rule (Rules for Supreme Court and District Courts of Appeal, rule 1, § 4).

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by James Jameson, by Frank Jones, his guardian ad litem, against Jack Gavett and others. From the judgment, the defendants appeal.

Motion to dismiss appeal denied.

Lewis R. Kirby and George A. Malette, both of San Diego, for appellants.

Edward J. Kelly and Ben B. Rubin, both of San Diego, for respondent.

BARNARD, Presiding Justice.

The respondent moved to dismiss the appeal herein on the ground that the appellants had failed to file their printed points and authorities within thirty days after the filing of the transcript, as required by rule I, section 4, of the Rules for the Supreme Court and District Courts of Appeal.

The transcript was filed on February 26, 1937. The motion to dismiss the appeal was filed on April 20, 1937. On May 8, 1937, the appellants filed their printed brief. Under the circumstances here appearing, the appeal should not be dismissed. North v. Evans, 114 Cal.App. 714, 300 P. 893; Toth v. Metropolitan Life Ins. Co., 113 Cal.App. 55, 297 P. 564; Tyner v. Axt, 111 Cal.App. 187, 295 P. 97; Fishman v. Silva, 108 Cal. App. 121, 291 P. 430; Righetti v. Monroe, Lyon & Miller, Inc., 106 Cal.App. 346, 289 P. 650.

The motion to dismiss the appeal is denied.

We concur: MARKS, J.; JENNINGS, J.



21 Cal.App.2d 9

PEOPLE v. GODSEY.

Cr. 1557.

District Court of Appeal, Third District, California.

May 10, 1937.

Criminal law ⇐1182

Conviction would be affirmed where no appearance was made for defendant, as required by statute, at time case was called for hearing (Pen.Code, § 1253).

Appeal from Superior Court, Yolo County; J. G. Bruton, Judge.

Walter Godsey was convicted of manslaughter, and he appeals.

Judgment and order affirmed.

Robert W. Tharp and Neal Chalmers, both of Woodland, for appellant.

U. S. Webb, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for the People.

PER CURIAM.

The appellant was convicted in the superior court of Yolo county of the crime of manslaughter, a felony.

The transcript on appeal was filed in this court April 7, 1937. No brief has

been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on May 10, 1937. No appearance was made for appellant at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order are affirmed.



In re RATH'S ESTATE.*

FAY et al. v. RILEY, State Controller, et al.

Civ. S. C. 53.

District Court of Appeal, Second District, Division 1, California.

April 30, 1937.

Rehearing Denied May 27, 1937.

Hearing Granted by Supreme Court June 28, 1937.

1. Taxation ⇐861

Transfer of property by will or succession is taxable under inheritance tax law in force at date of decedent's death, and rule applies to estate in remainder even though contingent or defeasible.

2. Taxation ⇐861
Wills ⇐63

Where husband and wife, in accordance with written agreement made by them to provide for wife's nephews, executed separate wills devising all property to the other with provision that should the other spouse die first, property should go to nephews, and wife predeceased husband, life estate passed to husband with remainder over to nephews, in view of agreement and wills, so that inheritance tax due from nephews upon husband's death was determinable under statute in force on date of wife's death (St.1929, p. 1842, § 8).

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Proceedings in the matter of the estate of William A. Rath, deceased, wherein an order was made which included a determination as to the inheritance tax payable by Kenyon Tudor Fay and another, executors. From that portion of the order determining the matter of inheritance tax, the executors appeal, and H. L. Byram, county treasurer of Los Angeles County, and another, are respondents.

Reversed.

Henry O. Wackerbarth, of Los Angeles, for appellants.

W. H. H. Gentry, of Sacramento, and Clyde C. Triplett, of Los Angeles, for respondent Ray L. Riley, State Controller.

HOUSER, Presiding Justice.

In her lifetime, Nellie Fay Rath owned as her separate property four certain town lots. With reference thereto, it was not only her desire, but also that of her husband, William A. Rath, that should the latter survive the former, and should the latter thereafter, during the remainder of the time that he should live, be in need of said property or any portion of the value thereof for the purpose of providing at any time for his "support and livelihood," he should be privileged to use it to that end; otherwise, at his death either the entire property, or such of it as remained in any form, should go to two designated nephews of Mrs. Rath. In order to provide for such a disposition of the said property, not only did Mr. and Mrs. Rath enter into a written agreement, one with the other, but as well, each of them executed a will, which in substance and effect either contained, or purported to carry out, the wishes and desires of the respective parties in that regard. Some time thereafter Mrs. Rath died, and within six months next ensuing Mr. Rath also passed away. The estate of Mrs. Rath, including the particular property to which reference hereinbefore has been had, was regularly distributed to the estate of Mr. Rath; but when the matter of the distribution of his estate came on for determination, an incidental question arose regarding the amount which was then payable as inheritance tax by the nephews of Mrs. Rath. In that connection, they contended that the amount which would become due to the state as and on account of the inheritance tax on the value of the said property should be determined as of the date of Mrs. Rath's death. Following a hearing in the lower court on that issue, an order was made which included the determination, in effect, that the property was demised, and that title passed, to the two nephews, not by reason of the legal effect of the several instruments to which refer-

ence hereinbefore has been had, but rather solely by the will of Mr. Rath; and consequently, that the inheritance tax was to be levied as of the date of his death. It is from that portion of the order or "judgment" that the two nephews have prosecuted the instant appeal.

Preliminarily, and as a foundation for the contention on the part of appellants that title was passed to them by virtue of the respective wills of Mr. and Mrs. Rath together with the agreement, two points are presented, namely: (1) That the agreement which was entered into between Mr. and Mrs. Rath respectively was made for the express benefit of appellants; and (2) that the said agreement, together with the will of each of the parties thereto, "should be read as one document." With regard to such issues, respondent not only does not resist, but concedes, the correctness of appellants' position. The result is that the only important question which remains in the appeal ultimately relates to the time or the date when title of some sort to the particular property vested in appellants; and in order that a determination thereof may be reached, it would seem meet to consider the pertinent language that was employed by the testator and the testatrix, both in the respective wills of such persons, and also in the agreement which was entered into between them. In that regard, by the said agreement it was provided that Mrs. Rath would make a will "leaving the said property * * * to the said party of the first part (the husband) in the event that he shall survive her" (the wife); and in that connection, Mr. Rath agreed that he also would make a will by which he would devise "all of said real property * * * or such portion thereof as has not been used or consumed by him during his natural life for his support and livelihood, in whatsoever form the same may then be in, whether in the form of real estate, money, investments, or securities, unto the said two nephews of the said party of the second part (the wife). * * *" Furthermore, it was expressly agreed that the agreement itself was "made for the benefit" of the said two nephews. By the will of Mrs. Rath, which was executed contemporaneously with the agreement, she devised to her husband, Mr. Rath, "all of the property of which I die possessed, both real and personal, of every kind, name and nature, and wheresoever the same may be situated." But her will also contained the provision that "in the event that my said beloved husband, William A. Rath, shall not survive me, then and in such event, I hereby give, devise and bequeath all of the property of which I die possessed unto my nephews. * * *" In accord with the spirit of said agreement, Mr. Rath likewise made his will, which contained a provision by which, in the event that Mrs. Rath should survive him, all his property was devised to her; but also, that in the event he should be the surviving spouse, "all of the property" of which he might "die possessed" was devised unto his "wife's two nephews."

From a consideration of the several instruments considered as a whole, it would seem apparent that it could not be seriously contended that the intention of Mrs. Rath was to do otherwise than to devise her estate to her husband, to be "used or consumed by him during his natural life for his support and livelihood"—provided, that if at the time of his death, anything should remain of her former separate estate, he would will it to her two nephews. However, by her will, Mrs. Rath devised the property directly and without limitation to her husband; following which, she provided that if he should not survive her the property should go to her two nephews. Apparently, and aside from judicial decisions in cases that have arisen on similar facts, as far as the language of either of such instruments (considered separately) discloses, not the slightest obstacle was placed in the way of full and complete investiture of title to the property in the husband at the moment of the death of the wife, and on the happening of that event he was entitled to "use or consume" either the whole or any part of the property for "his support and livelihood." Nor, considering all of said instruments together, immediately on the death of Mrs. Rath, notwithstanding the conceded fact that the several instruments here under consideration were "made for the benefit" of the two nephews, would they or either of them have any just right to complain. By no means could they at that moment rightfully assert a present title in fee, either to the whole or to any portion of the property that formerly had belonged to her. They became entitled to share in the corpus of Mrs. Rath's estate only in the event that some part thereof remained at the time of the death of Mr. Rath. They had a sort of expectancy only, which, before it might ripen into something tangible or real, depended upon the condition that on the death

of another person, to wit, Mr. Rath, the subject-matter thereof, or some portion of it, remain at least as a part of his apparent estate. But notwithstanding such conditions and circumstances, in dealing with analogous situations, the courts, not only of this state, but as well, those of other jurisdictions, have ruled that on the death of the original donor of the property, the direct beneficiary under the provisions of the will takes a life estate only, with vested remainder in the persons so designated.

In the case of Chesnut v. Chesnut, 300 Pa. 146, 151 A. 339, 75 A.L.R. 66, the will provided: "I * * * devise * * * to my * * * sister * * * all of my estate." In the following paragraph it continued: "Should there be any of my estate, real, personal, or mixed, or the proceeds thereof unused or not required for the support of my said sister * * * remaining over at her decease, then it is my will that such remaining estate, interest or the proceeds of what I have herein given to my said sister * * * shall at her * * * death be given, devised, bequeathed, taken and held by my brother, * * * he to use or do with the said estate, remainder or proceeds of the same as he may think best." The court construed the will as giving a life estate to the sister, with the right to consume the principal for the purpose of her support, and said, in part: "If the present will shows that there is a devise over, as clearly it does, or that testatrix's dominant purpose was to give her sister less than a fee-simple estate, as we think it does, then the sister, through whom defendants claim, did not get an absolute title to the real estate." The court then quoted from In re Wettengel's Estate, 278 Pa. 571, 123 A. 488: "While testator, in the above-quoted residuary clause of his will, makes the devise to his three daughters and 'their heirs and assigns,' he immediately follows this apparently absolute gift by words plainly indicating a contrary intent. We have repeatedly held that, where the dominant purpose shown by a devise is to vest a fee, this estate cannot be stripped of its inherent attributes by subsequent words (merely) indicating an intent so to do. * * * On the other hand, we have probably as often held that, in finding the controlling intention, all the words used by testator should be taken into account, and, if the intent to restrict the gift is clear, it must be given effect. * * * The present will falls fairly within the last-stated rule."

In Allen v. Hirlinger, 219 Pa. 56, 67 A. 907, 13 L.R.A.(N.S.) 458, 123 Am.St. Rep. 617, with reference to a devise to the wife "for life or widowhood, with permission to use and live therefrom and to have the full ownership, the same as he [testator] had himself during his life, and at her death whatever should remain to be given to his daughter," it was said:

"The class of wills to which this belongs presents inherent difficulties in construction by their indication of an intent not accurately defined in the testator's own mind, if not of double and to some extent conflicting intents. The testator gives to the first taker the estate, or what is practically the same thing, the power to consume the whole, and yet manifests his expectation at least, if not his intention, that it shall not all be consumed. These two purposes, manifestly present in his mind, but not accurately defined, and their possible conflict, perhaps not perceived at all, at once raise the question: Has the will limited the estate given, or has it attempted to deprive the estate given of some of its essential legal properties? The cases must be classified on this line of distinction. In Good v. Fichthorn, 144 Pa. 287, 22 A. 1032, 27 Am.St.Rep. 630, it was said: 'The true test of the effect of language apparently at variance with other parts of the devise is whether the intent is to give a smaller estate than the meaning of the words of the gift standing alone would import, or to impose restraints upon the estate given. The former is always lawful and effective, the latter rarely, if ever. The first, because the testator's intention is the governing consideration in the construction and carrying out of a will; the second, because even a clear intention of the testator cannot be permitted to contravene the settled rules of law by depriving any estate of its essential legal attributes.' * * *

"The gift to the widow is of the estate; she to be 'the real owner thereof,' and 'with full permission to her to use and live therefrom as her necessities may require.' And she is to have 'the full ownership thereof the same as I now have, and have had during my natural life.' It is plain that he meant her to have whatever her necessities should require, even to the extent of the entire estate, as he had himself undoubtedly had during his lifetime. * * *

There was no limit put on her use. If she needed the whole, she was to have the whole. But it is plain that he did not think she would need the whole, and expected that there would be something left, and this residue, be it much or little, he gave to his daughter. * * * The appellant does not have a fee simple, for she could not make a valid devise of what may be left at her death, as that would go under the testator's will to his daughter. But appellant has an unlimited power to consume, and, as said in the very analogous case of Kennedy v. Pittsburg & L. E. R. R. Co., 216 Pa. 575, 65 A. 1102, the power to consume real estate necessarily includes the power to convey. Her deed therefore will convey a good title."

In Colburn v. Burlingame, 190 Cal. 697, 214 P. 226, 227, 27 A.L.R. 1374, where the opinion in Allen v. Hirlinger, supra, was quoted from at length, the facts were as follows: The will provided: "I give * * * to my * * * wife * * * the entire handling and control of any and all of my real estate and * * * personal property, * * * to have and to hold, occupy or use the whole or any part thereof * * * as may in her judgment seem best for her own individual benefit, and support, * * * believing my * * * wife will not allow said property to depreciate or go to waste." The will was admitted to probate in Pennsylvania and a decree of distribution to the wife was made in that state pursuant to the will. The brothers of the testator, who under another clause of the will would take the property on the death of the wife, sought to enjoin her from disposing of the corpus of the estate and to compel her to post a bond for their protection. The Supreme Court affirmed a judgment of dismissal of the action, holding that although a life estate was created, nevertheless the widow was entitled to spend the corpus for her own benefit. The court said, in part: "The rule of construction here applicable is that stated in Hardy v. Mayhew, 158 Cal. 95, 110 P. 113, 139 Am.St.Rep. 73, where it is said: 'It appears to be settled by the overwhelming weight of authority that the mere fact that the first taker is invested with the power to dispose of or consume the whole of the property for certain purposes does not invest him with the absolute ownership thereof and render the gift over void where taking the whole instrument together it is concluded that the intent was to give only an estate for life, with limited power of disposal or consumption.' And the rule thus announced was followed in Luscomb v. Fintzelberg, 162 Cal. [433], 440, 123 P. 247."

In Hardy v. Mayhew, 158 Cal. 95, 110 P. 113, 114, 139 Am.St.Rep. 73, which involved the right of a legatee to give away the principal of a legacy which had been distributed to him, under the terms of the will, "for his use, during his natural life," and on his death "the unused portion of said sum" was to go to other relatives of the testator, it was said:

"Herein was clearly a distribution to Judge Mayhew of a life estate simply, an estate limited by express terms to his natural life, with the power of disposing of the principal, even to the extent of entirely consuming it, in such ways as might be consistent with his 'use' thereof, and a distribution of the remainder to plaintiff. * * *

"The interest given to Judge Mayhew was the kind of interest referred to in 2 Underhill on Wills, at section 689, a life interest by its express terms, with the power of disposing of a part or all of the property itself for a particular purpose only, as for the support and maintenance of the life tenant, with a valid gift over to the other distributees which might be disappointed by the exercise of his power by the life tenant and the application of the principal to the purposes indicated. As to such a life tenant Mr. Underhill says substantially, in another section, he may not use the proceeds of a sale of the property for another purpose, he cannot give them away, nor can he devise the land, and also that those who take what remains unused, do not take by descent, as heirs of the first taker, but as purchasers and remaindermen under the will of the testator (section 687)."

The same conclusion was reached in Adams v. Prather, 176 Cal. 33, 167 P. 534, 535, in construing a will which read: "I give all the property of which I die possessed to my husband. * * * Upon the death of my husband * * * one half of the unexpended portion of my estate bequeathed to my husband to be given to" (nieces of testatrix). To the same effect is In re Estate of Tooley, 170 Cal. 164, 149 P. 574, Ann.Cas.1917B, 516, where the words "If at her death she has neither husband or children I desire any property that may be left divided equally among my sisters and brother" were held to constitute

a valid limitation upon a devise made in unconditional language in an earlier paragraph of the will. In Re Estate of Thompson, 62 Cal.App. 493, 217 P. 127, 128, a provision in the seventh paragraph of a will to the effect that "I require and direct that in the event of my daughter * * * dying without issue such estate as shall remain shall be distributed," etc., was held not to be repugnant to the absolute devise to the daughter contained in the second paragraph of the will; that the "provisions of the will show a clear intent * * * to bequeath * * * a limited estate."

[1] A transfer of property by will or succession is taxable under the inheritance tax law in force at the date of death of the decedent (61 Cor.Jur. 1598, 1601; In re Drishaus' Estate, 199 Cal. 369, 249 P. 515; McDougald v. First Federal Trust Co., 186 Cal. 243, 199 P. 11; Riley v. Howard, 193 Cal. 522, 528, 226 P. 393, 397; In re Estate of Hite, 159 Cal. 392, 113 P. 1072, 32 L.R.A.[N.S.] 1167, Ann.Cas.1912C, 1014); and this is true of an estate in remainder (Riley v. Gordon, 137 Cal.App. 311, 319, 30 P.(2d) 617, 619, 61 Cor.Jur. 1600, 1685), even though contingent or defeasible (61 Cor.Jur. 1684, 1685). In the case last cited, a husband and a wife created a trust whereby the survivor was given a life estate in certain property and upon the death of the survivor, the relatives of the husband were to share in one-half the corpus of the trust, and the relatives of the wife were to share in the other one-half. The appellate court, in determining that the entire estate was taxable, said, in part: "* * * the remainders thereby created were vested though defeasible, and this vesting in interest constituted the succession. Consequently the taxable transfer occurred upon the creation of the trust and not upon decedent's death, although the market value thereof would be determined as of the date of death." The court further said: "It is clear, we think, that the transaction in question was in effect the transfer by decedent of a life estate in the community property to his wife contingent upon her survivorship, and, with her consent, of vested though defeasible interests in remainder, and that no title or estate passed from her to any one. This being true, it was a transfer within subdivision 3 of section 2 of the act (St.1921, p. 1500), and was taxable in its entirety to the husband's estate upon his death. Consequently no community exemption attached to the transfer to the beneficiaries other than the wife, and these beneficiaries should be taxed according to their relationships to decedent Gordon."

[2] At the time of the death of Mrs. Rath, the act then in force (St.1921, p. 1507, as amended by St.1929, p. 1842) contained the following provision: "Sec. 8. When any grant, gift, legacy, devise or succession upon which a tax is imposed by section 2 of this act shall be an estate, income, or interest for a term of years, or for life, or determinable upon any future or contingent event, or shall be a remainder, reversion, or other expectancy, real or personal, the entire property or fund by which such estate, income, or interest is supported, or of which it is a part, shall be appraised immediately after the death of the decedent, and the market value thereof determined, in the manner provided in section 16 or 17 of this act, and the tax prescribed by this act shall be immediately due and payable."

In Riley v. Howard, supra, with reference to a similar provision in an earlier act, the court said: "The value of the property or interest is to be determined as of the day of death and not in reference to a subsequent day"; and "Many other authorities might be cited to the effect that the taxability of inheritances, devises, etc., such as are provided for by the several inheritance tax acts, must be determined by the law in effect at the time the transfer is made and the market value thereof as of the date of the death of the decedent."

It follows that under the construction placed upon the instruments here involved, to wit, that upon the death of Mrs. Rath on February 8, 1935, a life estate passed to her husband, with remainder over to appellants, an inheritance tax due from appellants should have been determined under the act in force on that date.

That part of the order or "judgment" from which the appeal is taken is reversed.

We concur: YORK, J.; DORAN, J.

21 Cal.App.2d 4

KOHLHAUER v. BRONSTEIN.

Civ. 11399.

District Court of Appeal, Second District, Division 2, California.

May 11, 1937.

1. Automobiles ⇐246(58)

Under evidence that motorist "shot" his automobile across and in front of street car beside which he was driving and into collision with motorcycle at intersection, that motorcycle skidded for considerable distance before collision, and that motorcyclist suffered loss of memory, and under motorcyclist's testimony that he did not recall seeing automobile before collision, instruction on doctrine of sudden peril *held* proper.

2. Trial ⇐91

Where no objection was made prior to answer of witness to interrogation as to whether witness made statement to defendant motorist after collision implying that motorist was negligent, denying motion to strike such testimony *held* not error.

3. Evidence ⇐220(2)

In action for motorist's negligence, testimony as to statement made to motorist after collision that, because of his manner of driving, "you should have broken your neck" *held* admissible, since it was for jury to weigh surrounding circumstances to determine whether motorist's conduct in response to such charge of negligence was an admission of negligence (Code Civ.Proc. § 1870, subd. 3).

Appeal from Superior Court, Los Angeles County; Parker Wood, Judge.

Action by William Lawrence Kohlhauer against Ben Bronstein. From a judgment for plaintiff, defendant appeals, and plaintiff moves to dismiss, or to affirm the judgment.

Judgment affirmed.

See, also, 9 Cal.App.(2d) 166, 48 P.(2d) 994.

Gibson, Dunn & Crutcher, by Philip C. Sterry, of Los Angeles, for appellant.

George P. Kinkle and Gretchen Wellman, both of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This case comes before us on a motion to dismiss or to affirm the judgment. The appeal is by the defendant from a judgment in an automobile collision case. The plaintiff was traveling along the highway parallel to a street car and at the same rate of speed, but near the curb of the street. Just as the street car was crossing an intersection the defendant "shot" his automobile across and in front of the street car and into a collision with the plaintiff's motorcycle.

[1] The court gave an instruction to the jury on the doctrine of sudden peril, and the first contention of the defendant is that the giving of this instruction was prejudicial error for the reason that "there was no evidence tending to show that the plaintiff was in a position of sudden peril" and that "plaintiff at no time saw the automobile of the defendant. This fact is conclusively established by his own testimony. * * *" As frequently happens, where one has received a severe personal injury from an accident, the plaintiff suffered a loss of memory as to all matters connected with the accident. The record shows that the plaintiff did not testify he did not see defendant's automobile at any time before he ran into it, but merely that he did not recall seeing it. On the other hand, the very circumstances of the accident as related both by the plaintiff's and the defendant's witnesses furnish the basis for a reasonable inference that the plaintiff suddenly became aware of the proximity of the defendant's automobile and of the peril arising therefrom. The defendant himself testified that he did not see the motorcycle before the accident, his attention being attracted when he heard the tires of the motorcycle skidding, at which time he first observed the motorcycle right opposite his automobile. There is other evidence to indicate that the skidding was for a considerable distance before the collision. Under this view of the evidence, an instruction on the doctrine of sudden peril was a proper one. Raymond v. Hill, 168 Cal. 473, 143 P. 743; Wiley v. Young, 178 Cal. 681, 174 P. 316.

During the course of the trial the following occurred:

"Q. By Mr. Kinkle: I will ask you if * * * you stated to Mr. Bronstein, 'Why were you driving on the wrong side of the street shooting past that street car in a reckless manner?' And if he did not reply in substance and effect, 'I hurt or broke my hand.' And if you did not state

to that, 'The way you were driving you should have broken your neck.' Is that the substance of it? A. That is the substance of it, practically the same.

"Mr. Sterry: If the court please, move that be stricken as wholly incompetent and immaterial.

"The Witness: His hand was swollen.

"Mr. Kinkle: Submit it as directly to the point.

"The Court: Deny the motion."

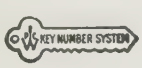
It is the defendant's final contention that this ruling was prejudicial error.

[2] It will first be observed that timely objection was not made prior to the witness' answer. In re De Laveaga's Estate, 165 Cal. 607, 133 P. 307.

[3] In the second place the significance of defendant's evasion and then silence in the face of such an accusation of negligent driving was a proper circumstance in evidence for the consideration of the jury in determining whether this was or was not an admission by defendant of his negligence. Code Civ.Proc. § 1870, subd. 3. It was for the jury to weigh the surrounding circumstances in order to determine what would be the usual and natural course for one to pursue when confronted with such a charge. Baldarachi v. Leach, 44 Cal.App. 603, 186 P. 1060.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, J.



20 Cal.App.2d 735

In re JOHNSON'S ESTATE.

TYLER v. KATZ.

Civ. 10422.

District Court of Appeal, First District, Division 1, California.

May 10, 1937.

Hearing Denied by Supreme Court July 9, 1937.

1. Executors and administrators ⇐20(5)

If person who is entitled to letters of administration files a petition asking that letters be granted to another, the petitioner is "applicant," within statute requiring that petitions for letters of administration must be signed by applicant or his counsel (Probate Code, § 440, as amended by St.1933, p. 2492).

[Ed. Note.—For other definitions of "Applicant," see Words & Phrases.]

2. Executors and administrators ⇐20(4)

If nominee is applicant for letters of administration, petition may be treated as having been filed on behalf of applicant, and signature of counsel meets requirement of statute requiring petitions for letters to be signed by applicant or his counsel (Probate Code, § 440, as amended by St.1933, p. 2492).

3. Executors and administrators ⇐20(4)

If nominee's signature is a jurisdictional requirement on which letters of administration must be based, such fact is supplied by nominee's consent to act, and letters issued thereon are not void (Probate Code, § 440, as amended by St. 1933, p. 2492).

4. Executors and administrators ⇐17(7)

Appointment of widow's daughter as administratrix on widow's nomination *held* not unauthorized because widow and not daughter signed petition for letters, where widow petitioned that letters be issued to her or some competent person she might nominate, and on hearing of the petition the nomination and request by widow, as petitioner, for appointment of her daughter was filed in open court, and appointment was made on such nomination (Probate Code, § 422, and § 440, as amended by St. 1933, p. 2492).

5. Executors and administrators ⇐20(8)

Trial court *held* to have jurisdiction to continue hearing of petition for letters of administration of estate of deceased for purpose of having notice given to heirs as required by statute, where no notices had been mailed to heirs named in petition of hearing at which continuance was granted (Probate Code, § 441).

6. Wills ⇐320

Court, on hearing of an application to admit a will to probate, may continue matter until proper proof of mailing is produced where proof thereof is insufficient.

7. Executors and administrators ⇐32(2)

Order setting aside order appointing widow's nominee for letters of administration could not be justified on ground that it had been inadvertently made, where identical evidence and record before court when

it made order appointing nominee was before it when subsequent order setting aside former order was made, and no appeal had been taken from order appointing nominee.

8. Executors and administrators ⇐20(10)

Order setting aside order appointing widow's nominee as administratrix *held* appealable under statute providing that an appeal may be taken from an order granting or revoking letters testamentary or of administration (Probate Code, § 1240, as amended by St.1935, p. 1972).

Appeal from Superior Court, San Francisco County; Frank H. Dunne, Judge.

Proceeding in the matter of the estate of John Martin Johnson, deceased. From an order setting aside the appointment of Evarista F. Tyler, as administratrix of the estate of John Martin Johnson, deceased, and from an order appointing Phil C. Katz as administrator of the estate of John Martin Johnson, deceased, in her place and stead, Evarista F. Tyler appeals.

Orders reversed.

David Cosgrave, of Downieville, and William P. Hubbard, of San Francisco, for appellant.

Henry F. Boyen, of San Francisco (Frank J. Fontes, of San Francisco, of counsel), for respondent.

TYLER, Presiding Justice.

Appeal from an order setting aside the appointment of an administratrix and revoking her letters of administration, and also from an order appointing the public administrator of San Francisco as administrator in her place and stead. The facts are undisputed and show that one John Martin Johnson died intestate in the City and County of San Francisco and left an estate therein and a surviving widow, Katherine A. Johnson. Deceased left no other heirs or relatives in California. On December 9, 1935, the surviving widow filed her petition for the administration of the estate wherein she prayed that letters of administration be issued to her or to some competent person she might nominate. The clerk fixed December 23, 1935, as the time for hearing and duly posted notices as required by statute. By inadvertence no notices were mailed to the heirs named in the petition. At the time fixed for hearing an attorney for all nonresident heirs appeared and objected to the hearing at that time on account of the absence of proof of mailing of notices to the heirs, whereupon the mattter was continued until January 3, 1936, without objection by any one. On December 23, 1935, notices of the hearing were mailed to all the heirs. On January 3, 1936, at the time set for the hearing, the surviving widow appeared through her attorney who filed nomination and request by the surviving widow for the appointment of her daughter, Evarista Faxon Tyler, as administratrix in her place and stead. The attorney who appeared for all the heirs except the surviving widow then and there filed written request for notices of all proceedings to be given to him as their attorney. Proof was made of the continuance and of all matters set forth in the petition for administration and the nomination by the widow of her daughter, appellant herein. No objection to the nomination was made by the attorney representing the other heirs nor from any one else and the court appointed the daughter as administratrix. Thereupon she duly executed the bond as required by the order of appointment and in every respect duly qualified as such administratrix and she caused notice to creditors to be published. On February 1, 1936, Phil C. Katz, as public administrator filed notice of motion to set aside the order appointing appellant as administratrix, and on the same day filed a petition for letters of administration to himself. On March 31, 1936, the court granted the petition to set aside the appointment of the daughter as administratrix and revoked her letters, and on the same day appointed the public administrator as general administrator. Both of these orders are the subject of this appeal.

[1-7] The petition by the public administrator to set aside the order appointing appellant as administratrix, and revoking her letters, set forth as grounds for the petition that the court was without jurisdiction to appoint the daughter and that the appointment was made through inadvertence and mistake as Evarista Faxon Tyler, the daughter, had not filed any petition for letters, and that no notice of any application was ever given, for which reasons the order of appointment was wholly null and void. This contention was based upon two grounds: (1) That the petition for her appointment should have been signed by the daughter as the nominee of the surviving widow rather than by the

widow herself; (2) that the notice required by section 441 of the Probate Code to be mailed to the heirs named in the petition had not been mailed ten days before December 23, 1935, the time the petition was originally set for hearing, and because no proof of such mailing was on file the court did not have jurisdiction to continue the hearing until January 3, 1936, even though at such time, when the hearing was actually had and the appointment made, affidavit of mailing ten days before January 3, 1936, was on file and before the court. The grounds urged did not justify the setting aside of the original order. The petition for the appointment of the administratrix was signed by the surviving widow and by her attorney. The prayer of the petition was "upon said hearing and the proofs to be adduced, letters of administration of said estate may be issued to your petitioner, or to some competent person to be nominated by your petitioner." Upon the hearing of the petition for letters the nomination and request by the surviving widow, as petitioner, for the appointment of her daughter was filed in open court, and based upon this nomination the appointment was made. Section 422 of the Probate Code gives preference to the surviving spouse, or some competent person whom he or she may request to have appointed. It has been held that if one who is entitled to letters of administration files a petition asking that letters be granted to another, the petitioner is the applicant within the meaning of the statute (Probate Code, § 440, as amended by St.1933, p. 2492). If, on the other hand, the nominee is the applicant, then the petition may be treated as having been filed on behalf of such applicant and the signature of counsel meets the requirements of the statute. If the nominee's signature be considered a jurisdictional fact, it is supplied by her consent to act, and the letters are not void. Jerauld v. Chambers, 44 Cal. App. 771, 187 P. 33; 11A Cal.Jur. p. 341, § 236. The petition of the widow was, therefore, sufficient as it contained all the jurisdictional facts necessary to be set forth under the statute. There is no statutory requirement that the nominee sign the application. The court was therefore not acting beyond its jurisdiction in appointing the daughter administratrix. Wilkie v. Bailey, 74 Wash. 241, 133 P. 388. Equally without merit is the claim that the court was without jurisdiction to continue the hearing for the purpose of having notice given to the heirs as required by section 441 of the Probate Code. The attorney representing all the heirs except the widow was present at the subsequent hearing and made no objection to the appointment. A court has power upon the hearing of an application to admit a will to probate to continue the matter, where proof of the mailing is insufficient, until proper proof be produced. Murray v. Superior Court, 207 Cal. 381, 385, 278 P. 1033. Nor can the order setting aside the previous order appointing appellant be justified, as claimed, under the guise that it was inadvertently made. The identical evidence and record were before the court when it made the order appointing appellant as they were when it made the subsequent order setting aside the former order. Moreover, no appeal was taken from the order appointing appellant.

[8] Respondent makes the further claim that the vacating order is not appealable. Section 1240 of the Probate Code (as amended by St.1935, p. 1972) plainly states than an appeal may be taken from an order granting or revoking letters testamentary or of administration, and this appeal is controlled by the section.

We conclude, therefore, that the two orders appealed from should be reversed. This conclusion renders unnecessary a consideration of other questions presented. For the reasons given, the orders are reversed.

We concur: KNIGHT, J.; CASHIN, J.

20 Cal.App.2d 612

KANAME TOKAJI et al. v. STATE BOARD OF EQUALIZATION et al.

Civ. 11210.

District Court of Appeal, Second District, Division 1, California.

April 30, 1937.

Hearing Denied by Supreme Court June 28, 1937.

1. **Constitutional law** ⇐277(1)

Right to possess, make, or deal in intoxicating liquors is not a "privilege" or "property" within protection of Fourteenth Amendment (St.1935, p. 1123; Const.U.S. Amend. 14).

[Ed. Note.—For other definitions of "Privilege" and "Property," see Words & Phrases.]

2. **Intoxicating liquors** ⇐15

Liquor license statute requiring that sellers of liquor for consumption on the premises, as distinguished from sellers for consumption off the premises, be citizens of the United States *held* not unreasonable classification (St.1935, p. 1123).

3. **Intoxicating liquors** ⇐6

Liquor traffic is peculiarly within police power of state and may be prohibited or regulated at will of Legislature.

4. **Treaties** ⇐7

Treaties are subject to same rules of interpretation as other documents.

5. **Intoxicating liquors** ⇐15
Treaties ⇐11

Liquor control statute requiring that sellers of liquor for consumption off the premises be citizens of the United States *held* not invalid as applied to Japanese aliens as conflicting with treaty with Japan which provided that subjects of each nation should have liberty "to carry on trade and generally do anything incident to" trade "on the same terms as native citizens," on theory that "generally" meant that contracting parties contemplated possible exceptions to application of treaty terms (St.1935, p. 1123; Treaty Between United States and Japan, arts. 1, 2, 37 Stat. 1504; Const.U.S. art. 6, cl. 2 and Amend. 10).

[Ed. Note.—For other definitions of "Generally," see Words & Phrases.]

HOUSER, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Kaname Tokaji and K. Kawano for a writ of mandate against the State Board of Equalization and John C. Corbett and others as members of such board. From an order sustaining demurrer to the petition, and judgment discharging the writ and dismissing the petition, plaintiffs appeal.

Judgment affirmed and appeal from order sustaining demurrer dismissed.

Clare Woolwine and Leonard Comegys, both of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and Walter L. Bowers, Deputy Atty. Gen., for respondents.

DORAN, Justice.

This is an appeal from an order sustaining a demurrer to a petition for a writ of mandate as well as from the judgment discharging the alternative writ and dismissing the petition.

The petition set forth that each petitioner for some years last past had owned a café or restaurant in or near the city of Los Angeles; that prior to the year 1936 each had held an "On Sale Distilled Spirits License" issued by the State Board of Equalization; that each sought from said board a license for the year 1936 and in each case said board refused to allow petitioners to file such applications, giving as reasons therefor that petitioners were not citizens of the United States and hence were not eligible as licensees. The petition contained the further allegation that petitioners were otherwise qualified to hold such "On Sale" licenses and that the refusal by said board to grant said licenses would result in the loss to said petitioners of their respective businesses.

The prayer to the petition and the alternative writ of mandate issued thereon required respondents to grant permission to file said applications and to consider and allow the same if no reasons for denial thereof existed other than the fact that petitioners were not citizens of the United States. The demurrer to the petition was sustained without leave to amend and a judgment of dismissal followed.

The law governing the sale of alcoholic beverages in the state of California is to be found in an act entitled "Alcoholic Beverage Control Act" which is defined by said act to be, in part, an act to license, regulate, and control the manufacture, transportation, sale, purchase, possession,

and disposition of alcoholic beverages; to provide for the licensing of the manufacture, distribution, and sale of alcoholic beverages and to prescribe penalties for the violation of said act. Stats. of 1935, c. 330, p. 1123. Authority for the enforcement of the act is vested in the State Board of Equalization.

The act provides for ten different types of licenses, one of which entitled "On Sale" license authorizes the sale of alcoholic beverage, specified in the license, for consumption on the premises where sold. Another type, entitled "Off Sale" license, authorizes the sale, to consumers only and not for resale, of distilled spirits for consumption off the premises where sold. By section 12 of said act it is provided that "No on-sale distilled spirits license shall be issued to any applicant who is not a citizen of the United States."

It is the contention of appellants, who are subjects of the empire of Japan but residents of the state of California, that said section 12 of the Alcoholic Beverage Control Act which prohibits the issuing of an "On-Sale Distilled Spirits License" to one not a citizen of the United States is invalid in that (1) it deprives appellants of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, (2) it denies to appellants equal protection of the laws in violation of said Fourteenth Amendment, and (3) it violates the terms, provisions, and intent of the Treaty of Commerce and Navigation between the United States and Japan, and in particular articles 1 and 2 thereof, proclaimed April 5, 1911 (37 Stat. 1504).

[1] With respect to the contention that by the act in question appellants are deprived of their property without due process of law, it is urged by them that they cannot successfully operate their cafés without the liquor privilege and that therefore the denial of a liquor license will, in effect, deprive them of their property in violation of the Fourteenth Amendment. It is well settled that the right to possess, make or deal in intoxicating liquor is not a privilege, nor such a property right that state legislation prohibiting, restricting, or regulating its manufacture, use, possession, distribution, or sale violates the Fourteenth Amendment of the Federal Constitution. Mugler v. Kansas, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205; Kidd v. Pearson, 128 U.S. 1, 9 S.Ct. 6, 32 L.Ed. 346; Crowley v. Christensen, 137 U.S. 86, 11 S.Ct. 13, 15, 34 L.Ed. 620. Regarding this subject it was recently declared: "Unlike the rule with respect to the right to deal in ordinary commodities * * * there is no inherent right in a citizen to sell intoxicants * * * and a license to do so is not a proprietary right within the meaning of the due process clause of the Constitution; * * * it is but a permit to do what would otherwise be unlawful, and consequently a statute authorizing its revocation does not violate the due process clause, and it may be revoked without notice or hearing without invading any constitutional guaranties." State Board of Equalization v. Superior Court, 5 Cal.App.(2d) 374, 377, 42 P.(2d) 1076, 1077.

[2, 3] In connection with the second contention that appellants are denied equal protection of the laws, it is conceded, quoting from appellants' brief, "that, generally speaking, the State, in the exercise of its police power, has the right to discriminate between aliens and citizens in laws of the character of the one here involved. The case of Bloomfield v. State of Ohio, 86 Ohio St. 253, 99 N.E. 309, 41 L.R.A. (N.S.) 726, Ann.Cas.1913D, 629, settles this point for all time, as do many other similar authorities. But this exercise of police power must, to be valid, be so exercised within reason. Appellants urge that the act itself, and particularly section 12 thereof, are such an unreasonable attempt at the exercise of police power as to render them invalid. The act permits citizens and aliens alike to receive licenses for 'off sale' of beers, wines and liquors of all kinds. Likewise it affords aliens a like privilege to hold 'on sale' licenses for beers and wines. But without apparent reason, it denies to aliens the right to hold 'on sale' licenses for distilled spirits, and this distinction, we urge, renders the Act invalid as being unreasonable." In other words, appellants argue that because the act distinguishes between beers and wines on the one hand and distilled spirits on the other, it is unreasonable and therefore void. No effort, however, is made by appellants to point out that these products are incapable of distinction. It cannot be assumed that the law-making body acted without reason or that the distinction complained of was accidental. On the contrary, the mere mention of the question involved suggests several reasons for the difference of classification embodied in the act. The Legislature acted clearly within

its power and the limitation complained of cannot be said to be an invasion of any constitutional rights. As was declared by the United States Supreme Court in Crowley v. Christensen, supra, "There is no inherent right in a citizen to thus sell intoxicating liquors by retail. It is not a privilege of a citizen of the state or of a citizen of the United States. As it is a business attended with danger to the community, it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on, and to issue licenses for that purpose. It is a matter of legislative will only."

Finally, appellants submit, as the principal issue for consideration, the proposition that the statute in question violates the treaty between the United States and Japan. It is contended in this connection, and not without an abundance of authority, that where there is any conflict between a treaty made by the United States and the laws of an individual state, that the treaty will take supremacy over the state law, provided only that the treaty-making power was not exceeded. That portion of the treaty material to the issues herein involved is as follows: "The * * * subjects of each * * * shall have liberty * * * in the territories of the other to carry on trade, wholesale and retail, * * * and generally to do anything incident to or necessary for trade upon the same terms as native citizens." They "shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects."

It is appellants' contention that their right to sell distilled spirits, on an equal basis with citizens, is contemplated by the treaty, and in that regard the phrase therein "to carry on trade" is emphasized by appellants by reason of the claim that to sell alcoholic spirits is to carry on trade. It is urged that the violation of the treaty arises from the fact that the denial to appellants of the license above mentioned is the equivalent of a denial to them of the same rights and privileges as are granted to citizens of the United States. The argument follows that this discrimination brings about a conflict between the treaty and the Alcoholic Beverage Control Act, the result of which is to render the latter invalid.

[4] Inasmuch as the determination of the question depends upon the interpretation of the treaty, it should be noted that "treaties are subject to the same rules of interpretation as other documents." In re Estate of Ghio, 157 Cal. 552, 561, 108 P. 516, 525, 37 L.R.A.(N.S.) 549, 137 Am.St. Rep. 145.

Under the present state of the law, it may be conceded that it is uncertain whether there is any limitation at all on the treaty-making power of the federal government, even when the police power of the state is involved, for the Supreme Court of the United States has declared that "It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way." Missouri v. Holland, 252 U.S. 416, 40 S.Ct. 382, 383, 64 L.Ed. 641, 11 A.L.R. 984. Although article 6, clause 2, of the Constitution of the United States provides that "* * * all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land," nevertheless it is important to bear in mind the Tenth Amendment to the Constitution of the United States, which holds that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." In the case at bar the power of the state to regulate and control the liquor traffic is assailed, a power not delegated to the United States but reserved to the state. No citation of authority is necessary to support the proposition that the liquor traffic is peculiarly the subject of police power regulation. So definitely is this established by a long line of decisions that it is settled beyond all reasonable controversy. It is true that statutes which have conflicted with treaties have been held to be invalid, but such statutes did not contain police power regulations, at least not as outstanding as the statute involved herein.

[5] It is reasonable to assume that at the time the treaty was negotiated, the con-

tracting parties took into account the local laws of their respective countries. Indeed the wording of the treaty itself indicates such a purpose, for, although it is provided that the subjects of each shall have liberty in the territories of the other to carry on trade, such liberty is qualified by the further provision "and *generally* to do anything incident to or necessary for trade upon the same terms as native citizens." (Italics added.) In the absence of the word *"generally,"* the treaty rights would be without limitation. Obviously, then, the word *"generally"* must be interpreted to mean that the contracting parties contemplated possible exceptions. In other words, construing the word in connection with the context, it can only mean that an *approximate* application of the treaty terms was to be effected, as opposed to a *definite* and *unqualified* application. Its manifest purpose limits the phrase "shall have liberty * * * to carry on trade" and thereby makes allowance for contingencies, of which the present controversy is an example. Thus interpreted, the Alcoholic Beverage Control Act is in harmony with the treaty.

For the foregoing reasons, the judgment appealed from is affirmed. The appeal from the order sustaining the demurrer is dismissed.

I concur: YORK, J.

I dissent: HOUSER, P. J.



20 Cal.App.2d 720

PEOPLE v. DAVIDIAN et al.

Cr. 2913.

District Court of Appeal, Second District, Division 1, California.

May 8, 1937.

Hearing Denied by Supreme Court June 3, 1937.

1. Forgery ⇐15

Will *held* "instrument" within statutory provision that every person who knowingly procures or offers false or forged instrument to be filed, registered, or recorded in any public office which if genuine might be filed, registered, or recorded under any law of state or United States is guilty of felony, in view of statutes providing for filing and recording of wills (Pen.Code, § 115; Pol.Code, § 4131; Probate Code, § 332).

[Ed. Note.—For other definitions of "Instrument," see Words & Phrases.]

2. Forgery ⇐4

Crime of "forgery" is complete when one either makes or passes forged instrument with intent to defraud.

3. Forgery ⇐14

Fact that decedent died without estate *held* not to affect criminal liability for forgery of persons who counterfeited signature to will, especially where intent to defraud was shown by provisions in will cutting off two of decedent's children with bequest of $1 each while one of children was bequeathed $1,000 and another son made a residuary legatee.

4. Criminal law ⇐1035(6)

Objections to procedure in substitution of alternate juror and that substitution of alternate juror was unconstitutional *held* not available on appeal where objections were not raised in trial court until after substitution had been made and jury had retired and returned to courtroom for further instructions (Pen.Code, § 1089, as amended by St.1933, p. 1342).

5. Jury ⇐149

Statutory provision that court may order juror discharged and draw name of alternate who shall then take his place in jury box and be subject to same regulations as though he had been selected as one of original jurors was complied with where court selected first one of two alternates who had been drawn before original juror was discharged, as against contention that court was required to make another drawing after original juror was discharged (Pen.Code, § 1089, as amended by St.1933, p. 1342).

6. Criminal law ⇐1166½(6)

Judgment of conviction would not be reversed on appeal for irregularity, if any, in selection of alternate jurors in absence of showing that method of selection resulted in prejudice to defendant or deprived him of substantial right, since mere unprejudicial irregularities do not justify reversal (Pen.Code, § 1089, as amended by St. 1933, p. 1342).

7. Criminal law ⇐957(1)

Affidavit of alternate juror who was not substituted for discharged juror *held*

without value in determination whether defendant was prejudiced by irregularity, if any, in selection of alternate juror to take place of discharged juror, since such alternate juror could not know how she might have voted if she had had benefit of consultation with other jurors (Pen.Code, § 1089, as amended by St.1933, p. 1342).

8. Conspiracy ⇐47
Forgery ⇐44(½)

Evidence *held* to justify conviction for forgery and for conspiracy to violate, and violation of statute penalizing person who knowingly procures or offers false or forged instrument to be filed, registered, or recorded in public office, which instrument, if genuine, might be filed, registered, or recorded under law of state or United States (Pen.Code, § 115).

9. Criminal law ⇐1174(5)

Presence of doctor and nurse in anteroom with juror who was excused because of illness *held* not prejudicial error where juror did not thereafter act with jury (Pen. Code, § 1089, as amended by St.1933, p. 1342).

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Henry Davidian, Sauren Mathson, and Henry Hagopian were convicted of conspiracy to violate Penal Code, § 115, violation of Penal Code, § 115, and of forgery, and they appeal.

The appeal of defendant Henry Hagopian was dismissed, and the conviction of defendant Sauren Mathson was affirmed on motion. Conviction of defendant Henry Davidian affirmed.

Myer B. Marion, of Los Angeles, for appellant Davidian.

U. S. Webb, Atty. Gen., Eugene M. Elson, Deputy Atty. Gen., Buron Fitts, Dist. Atty., and Jere J. Sullivan and Herbert J. Scott, Deputy Dist. Attys., all of Los Angeles, for the People.

YORK, Justice.

By an indictment returned by the grand jury, the defendants were charged with the crime of criminal conspiracy to violate the provisions of section 115 of the Penal Code, with two violations of said section 115, and with the crime of forgery. They were found guilty of the offenses charged and have appealed from the judgments of conviction, as well as from the order by which their motions for new trial and in arrest of judgment were denied. The defendants Mathson and Hagopian were granted probation, and on November 23, 1936, the appeal of defendant Hagopian was dismissed; as to the defendant Mathson, the judgment and order from which he appealed were affirmed upon motion duly made therefor, and as result the appeal of defendant Davidian alone remains to be determined by this court.

From the record before us it appears that Theopholus Davidian, appellant's father, died in Los Angeles county on the 29th day of May, 1935; that on the 12th day of June, 1935, an instrument purporting to be the last will and testament of the said Theopholus Davidian, bearing date of January 18, 1935, was filed for probate with the county clerk of Los Angeles county by the defendant Mathson, who was one of the witnesses to the execution of the said purported will and who was named as executor therein. Appellant was the attorney for the proponent of this will, which was offered for and admitted to probate, but nothing more was done until the 6th day of March, 1936, when a second instrument purporting to be the last will and testament of the said Theopholus Davidian, bearing date of March 22, 1935, was offered for probate by the said defendant Mathson, who with defendant Hagopian was a witness to the execution of this second will and was named as executor therein. This latter will was offered through the office of R. M. Robertiello, an attorney at law.

Evidence was introduced at the trial to show that the signature of the testator to each of these wills was forged; that the defendant Mathson, who was the law clerk in the employ of appellant, offered these instruments for filing with the county clerk of Los Angeles county. There was evidence that appellant had guilty knowledge of the false nature of the wills and that he conspired with his codefendants to procure the filing of the wills for probate.

Upon this appeal, appellant presents the following questions:

1. Is a will an instrument within the purview of section 115 of the Penal Code?

2. Can the crime of forgery be committed where the signature to a will is counterfeited and decedent dies without estate?

3. Is the substitution of an alternate juror for one of the original jurors, who becomes ill after the cause has been finally

submitted to the original jurors and they have deliberated thereon, constitutional?

4. Assuming the provisions for alternate jurors after the final submission of the cause to be constitutional, where there are two alternate jurors who have been selected at the commencement of the trial, is the substitution of one of these alternates for an original juror who becomes sick, to be determined arbitrarily by the trial court or by lot?

5. Did the trial court err in permitting outsiders in the jury room?

Appellant also maintains that the court erred in denying his motions for dismissal, for new trial, and in arrest of judgment.

The indictment in this case is foundationed upon section 115 of the Penal Code, which provides as follows: "Every person who knowingly procures or offers any false or forged instrument to be filed, registered, or recorded in any public office within this state, which instrument, if genuine, might be filed, or registered, or recorded under any law of this state or of the United States, is guilty of felony."

[1] In connection with his first point, appellant claims that a will is not such an instrument as is contemplated by said section 115, supra. With this we are not in accord. In the first place, section 4131 of the Political Code makes it the duty of the county recorder to record wills admitted to probate, and further, section 332 of the Probate Code provides: "When the court admits a will to probate it must be recorded in the minutes by the clerk."

It should also be noted that when a petition for the probate of a will is filed with the county clerk of Los Angeles county, the original will is filed at the same time, and at the time of the hearing of the petition the original will is produced by the clerk and presented to the court sitting in probate, in order that its due execution and genuineness may be satisfactorily established.

[2, 3] As to appellant's second point, the crime of forgery is complete when one either makes or passes a false instrument with intent to defraud. People v. Whitaker, 127 Cal.App. 370, 373, 15 P.(2d) 883, citing People v. Lucas, 67 Cal.App. 452, 227 P. 709. We believe that it is immaterial whether decedent died with or without an estate, and as to this the record is in conflict; but the evidence shows that the decedent was the father of several children all of whom might have inherited his estate in equal parts had he died intestate. In the counterfeit will dated March 22, 1935, two children were cut off with a bequest of $1 each, while appellant was bequeathed $1,000 and another son made residuary legatee. Under these circumstances, it cannot well be said that there was no intent to defraud.

Appellant next contends that the substitution of an alternate for an original juror after final submission of the cause to the jury is unconstitutional; or, assuming that the provisions of section 1089 of the Penal Code, as amended by St.1933, p. 1342, for selecting alternate jurors are constitutional, that the method of selection in this case was error.

It appears from the record that after the cause had been submitted to the jury and a period of some seventeen hours had elapsed during which time the jury was deliberating thereon without arriving at a verdict, although several ballots had been cast, one of the jurors became ill. Dr. Blank, the county jail physician, was called to examine her, to which no objection was made, and it was found that the particular juror was incapable of carrying on her duties as a juror; whereupon she was discharged by the court, and one Harvey B. Titcomb, who had previously been the first of two alternate jurors selected and accepted by all counsel and sworn in as an alternate juror, was again sworn and took the seat vacated by the discharged juror. The proceedings which took place with reference to the drawing of this alternate juror are as follows: "Friday, June 26, 1936 at 11:58 A. M., (Present: The Court, Mr. Scott, Mr. Hardy, Mr. Thompson and the three defendants) Jury enters courtroom at 12 M.).

"The Court: Do you stipulate the jury is present and in their places, and the defendants are here?

"Mr. Hardy: So stipulated on behalf of the defendants.

"Mr. Scott: So stipulated.

"The Court: Mr. Foreman, there has been reported to me by the bailiff who has the jury in charge that one of the members is sick. Is that correct?

"The Jury Foreman (Charles M. Stockwell): Yes, Your Honor.

"The Court: It is further reported to me that one of the members, I think it is—who is it?

"The Foreman: I don't know of any other.

"Juror Mrs. Jensen: Mrs. Jensen.

"The Court: That she was sick all during the night and has been sick this morning. Is that right, Mrs. Jensen?

"Mrs. Jensen. Yes.

"The Court: Do you feel you are able to proceed further?

"Mrs. Jensen: No, I do not. I am awfully sorry about this. I just feel I cannot go on.

"The Court: You have been hysterical for—

"Mrs. Jensen: Yes.

"The Court:—some time.

"Mrs. Jensen: I hope I haven't caused any inconvenience to the court. I just feel I cannot go on.

"The Court: You feel you cannot proceed?

"Mrs. Jensen: I do; and I am awfully sorry about it.

"The Court: Is that the concurrence of the other jurors?

"Some Jurors: Yes.

"The Court: Have counsel any stipulation?

"Mr. Thompson: We are agreed what the law is. We don't want to work a hardship on anybody. Yet we don't want to get anybody in a position where our three weeks' work is going to be for naught. Does your Honor feel it might be advisable to find out, prior to making any change in the jury, whether there is any possibility of agreement as it now stands?

"The Court: They have never indicated to me, nor am I going to ask them. They are still deliberating.

"Mr. Hardy: I think the responsibility is with the Court and is not a matter for counsel.

"The Court: Then you don't desire to enter into any stipulation?

"Mr. Thompson: No, I think that is your job, judge; not ours.

"The Court: Dr. Blank, you made an examination?

"Dr. Blank: Yes.

"The Court: In the presence of the Bailiff?

"Dr. Blank: Yes.

"The Court: Your opinion is what?

"Dr. Blank: My opinion is, I do not think this particular juror is capable of carrying on her duties at this time.

"The Court: Let the record show the Court finds, not only from the evidence here but from the observation of the juror, that she is sick and unable to proceed. This juror will be discharged. Alternate No. 1 will be placed in her place in the jury box, as Juror No. 3. Doctor, will you attend her? Quite apparent she needs attention. Swear the juror.

"(Thereupon Harvey B. Titcomb, who had previously been the first one to be selected, accepted by all counsel and sworn in as an alternate juror, was now again sworn to try the cause, and took the seat just vacated by Mrs. Jensen, Juror No. 3.)

"The Court: Mr. Titcomb was empaneled as Alternate Juror No. 1. He has listened to the entire evidence in the court room and not associated with the jurors until now. All right. Anything further gentlemen? That will be all, then. I will take a recess at this time; the jury is in charge of the Bailiff.

"(Thereupon the Jury, as now constituted, retired for further deliberation.)

"Friday, June 26, 1936, at 3:35 P. M.

"(The jury returns to Court room at 3:35 P. M. Present: The Court; Mr. Scott, Mr. Hardy and Mr. Thompson, and all three defendants.)

"The Court: Do you stipulate the jury is present and in their places and the defendants are here?

"Mr. Scott: The People so stipulate.

"Mr. Hardy: So stipulated.

"The Court: Including the alternate. Mr. Foreman, the Bailiff indicated to me you desire further instructions, or the jury desires further instructions and directions; is that correct?

"The Foreman: It is.

"The Court: In what particular?

"Mr. Thompson: Your Honor, prior to this, in order that our stipulation that the jury is present be not misunderstood at a later date, we will stipulate that the jury is present but we won't stipulate as to the correctness of the jury as now constituted.

"The Court: What do you mean by that?

"Mr. Thompson: We don't want to waive any irregularities that may have existed by the substitution of Mr. Titcomb as the alternate, but are stipulating that the jury is present. We don't know that any exists, but we don't want to be in a position of having waived it.

"The Court: You mean that the Court, having excused one juror by reason of sickness that that juror is not here; is that it?

"Mr. Thompson: We realize the Court conducted the proceedings and we are in the dark—we are in the dark as to the law now. We don't want to, by our stipulation—

"The Court: Let the record show the jury is present—twelve members in the box, including the alternate which the Court placed in the box.

"Mr. Hardy: We will stipulate to that.

"The Court: And the other alternate juror that was sworn in is in the court room and present but not with the twelve jurors?

"Mr. Hardy: That is correct.

"Mr. Thompson: We stipulate to that."

[4] We feel that this objection—if it can be so called or if it was well taken—which was made by Mr. Thompson, counsel for defendants, came too late and can avail appellant nothing upon this appeal.

[5] The constitutionality of section 1089 of the Penal Code prior to its amendment in 1933, was before this court in People v. Peete, 54 Cal.App. 333, 202 P. 51; and said section was there held to be constitutional. The words added to this section by the amendment of 1933 (St.1933, p. 1342) are contained in the following paragraph: "*Drawing of alternate.* If at any time, whether before or after the final submission of the case to the jury, a juror die or become ill, so as to be unable to perform his duty, or if a juror requests a discharge and good cause appears therefor, the court may order him to be discharged and draw the name of an alternate, who shall then take his place in the jury box, and be subject to the same rules and regulations as though he had been selected as one of the original jurors."

As the names of the alternates were drawn they were designated as alternate No. 1 and alternate No. 2, instead of juror No. 13 and juror No. 14. The question apparently raised by appellant is that, because the court did not make another drawing after the original juror was discharged, appellant's constitutional rights were invaded. This would have no force unless the section uses the word "draw" in the sense that it is mandatory upon the court to draw the alternate juror again after the discharge of the original juror. It is our belief that the section is complied with when, as in this case, the court selects the first one of two alternates who were drawn before the original juror was discharged.

[6] If there was any irregularity in the selection of the alternate juror, it does not appear to have resulted in any prejudice to appellant, nor to have deprived him of any substantial right. It is well settled in this state that under such circumstances, and in the absence of an adequate showing of prejudice, the judgment will not be disturbed on appeal. No such showing was made. Mere unprejudicial irregularities do not justify a reversal.

[7] The affidavit of the alternate juror No. 2 has no value whatever, as no one knows, even affiant, how she might have voted, if she had had the benefit of consultation with the other jurors. Therefore, at most, her affidavit, if entitled to any consideration, which is not to be understood as conceded, was but an opinion.

[8, 9] After a careful examination of the record, we are of the opinion that appellant had a fair and impartial trial, which is all that is guaranteed by the Constitution of this state. Further, we believe that the evidence amply sustains the judgment, and that there was no error in the denial of the motion for new trial or the motion in arrest of judgment. The facts and circumstances do not show prejudicial error in that the doctor and nurse were present in the anteroom with the juror, who was excused. She did not thereafter act with the jury. The decision in the case of People v. Bruneman, 4 Cal.App.(2d) 75, 40 P.(2d) 891, as to disqualification of the jury by reason of the presence of outsiders is not in point here.

The judgment and the order appealed from are affirmed.

We concur: HOUSER, P. J.; DORAN, J.

20 Cal.App.2d 659

DISTRICT BOND CO. v. CANNON, Treasurer (SAULQUE et al., Interveners).

Civ. 11322.

District Court of Appeal, Second District, Division 2, California.

May 4, 1937.

Hearing Denied by Supreme Court July 1, 1937.

1. **Mandamus** ⇐176

Where resort may be had to an inexhaustible taxing power, owner of municipal bonds first to sue may recover amount available in fund.

2. **Mandamus** ⇐168(3)

In mandamus proceeding against city treasurer to compel payment of municipal bonds, wherein petitioner relied on rule that where resort may be had to an inexhaustible taxing power, owner of bonds first to sue may recover amount available in fund, evidence to substantiate allegations of answer that improvement district was insolvent *held* improperly excluded.

3. **Pleading** ⇐207

Failure to state any facts in pleading essential to recovery or defense may be reached by general demurrer, but where facts are stated imperfectly demurrer, to be effectual, must be special and directed against defect in question.

4. **Mandamus** ⇐176

In mandamus proceeding against city treasurer to compel payment of municipal bonds, petitioner could not rely on assumption that all of bonds were fortified by inexhaustible taxing power, where treasurer was erroneously prevented from proving insolvency of district which issued them.

5. **Appeal and error** ⇐150(3)

General rule that as between parties interested in estate, executors, receivers, and other custodians of funds are not ordinarily affected by orders in reference to their disposition and therefore will not be heard on appeal from such orders is limited in its scope and does not become operative in cases involving construction of proper exercise of duties of officer presenting appeal.

6. **Mandamus** ⇐187(3)

Lack of personal interest does not prevent public officer against whom writ of mandate has been issued from prosecuting an appeal.

7. **Mandamus** ⇐187(3)

City treasurer had right as an "aggrieved party" under statute to appeal from judgment in mandamus proceeding compelling her to pay out of funds in her hands certain bonds owned by petitioner, where district issuing bonds was insolvent, since judgment adversely affected interest of bondholders of whom treasurer was representative and determined treasurer's duty with reference to fund (Code Civ.Proc. § 938).

Appeal from Superior Court Los Angeles County; Thurmond Clarke, Judge.

Mandamus proceeding by the District Bond Company, successor in interest to Harry G. Sadicoff, against Marion E. Cannon, as treasurer of the City of Montebello, to compel payment of certain bonds, wherein Rosine R. Saulque and others intervened. From a judgment in favor of petitioner, the defendant appeals.

Reversed.

Louis H. Burke and Daniel G. Marshall, both of Los Angeles, for appellant.

Robert H. Dunlap, of Los Angeles, for respondent.

WOOD, Justice.

Petitioner seeks by writ of mandate to compel defendant, the treasurer of the city of Montebello, a city of the sixth class, to pay to it the entire balance in her custody of the interest and sinking fund of a district organized under the provisions of the Acquisition and Improvement Act of 1925 (St.1925, p. 849, as amended), notwithstanding the insufficiency of the fund to pay all of the matured bonds. The appeal is by the defendant from a judgment in petitioner's favor.

It is alleged in the petition, which was filed March 7, 1935, that petitioner is the owner of ten Series A Acquisition and Improvement District No. 6 bonds of the city of Montebello, numbered 18 to 27, inclusive, each of said bonds being in the principal sum of $1,000, and all of which became due and payable February 5, 1935. Petitioner presented these bonds to the defendant at her office on the due date thereof but payment was refused. At the time of filing the petition there was in the interest and sinking fund of the district the sum of $61.09 only. On April 27, 1936, a supplemental petition was filed in which

it is alleged that the interest and sinking fund had been augmented.

In defendant's answer it is alleged that on February 5, 1929, bonds were issued in the aggregate amount of $251,246, bearing interest payable semiannually. These bonds were numbered 1 to 252, inclusive, each of which being in the principal sum of $1,000 except bond No. 252, which was issued in the sum of $246. Bonds Nos. 1 to 17, inclusive, became due February 5, 1934, and annually thereafter 17 other bonds became or will become due. Bonds Nos. 7 to 13, inclusive, which matured February 5, 1934, were paid on February 5, 1934; bond No. 14, due February 5, 1934, was paid April 23, 1934; bond No. 15, due February 5, 1934, was paid May 25, 1934, and bond No. 16, due February 5, 1934, was paid January 16, 1934. Bonds Nos. 1 to 6, inclusive, and 17, which became due February 5, 1934, and bonds Nos. 18 to 34, inclusive, which became due February 5, 1935, were not paid because of lack of funds in the interest and sinking fund. Bonds Nos. 35 to 51, inclusive, became due, February 5, 1936. The total sum of $77,915.83 was past due and unpaid on principal and interest before the trial of the action. In the findings, which were dated November 13, 1936, the trial court found that the sum of $61.09 had since the filing of the petition been increased to the total sum of $9,845.20. Defendant set forth in her answer the details of the bonds outstanding and unpaid and of the demands made upon her for payment by the owners of other bonds, some of which were past due, including a demand made February 7, 1934, by the owner of bonds Nos. 1 to 6, inclusive. Defendant further set forth in answer that the land within this improvement district is also subject to the liens of and is encumbered by certain other special assessments, street improvement bonds and general county and municipal taxes in the approximate sum of $600,000, all of which she asserted to be valid and subsisting liens against said lands. She also alleged that said district and its interest and sinking fund are insolvent and that the reasonable market value of the land within said improvement district is less than the aggregate of the amounts of said special assessments, street improvement bonds, general county and municipal taxes and the unpaid balance of principal and interest of the bonds specifically referred to in this action. A number, but not all, of the owners of other unpaid bonds intervened in the action, asking to have their rights safeguarded, among these being the owner of the bonds which matured February 5, 1934.

None of the owners of other bonds were made parties defendant, and a number of them have not intervened. At the trial, when petitioner rested its case, objection was made to the introduction of testimony on behalf of the defendant and a general demurrer to the amended answer was interposed. The court sustained the demurrer to the answer without leave to amend and denied defendant's request for permission to amend. Judgment was accordingly entered by which defendant was ordered to pay to petitioner the entire sum then in the fund.

Six days after the judgment of the trial court was rendered the Supreme Court of California filed its decision in a case which is determinative of the issue involved herein. In Kerr Glass Mfg. Corp. v. City of San Buenaventura (Cal.Sup.) 62 P.(2d) 583, 584, the petitioner sought a writ of mandate to compel payment of the amount of certain bonds which it owned. We quote from the decision: "The bonds held by the petitioner were presented for payment to the city treasurer, but payment was refused because there was not sufficient money in the bond redemption fund to pay all of the outstanding and matured bonds of said series E, although there was sufficient to pay the petitioner in full. * * * The petition shows that the respondents have offered to pay to the petitioner such proportionate amounts from said bond fund on account of interest and principal due it as the amount of such interest and principal bears to the total amounts of interest and principal on all of said bonds, series E, still outstanding and unpaid. * * * In its answer the respondent city admits its willingness and offer to pay the petitioner on a pro rata basis, computed on the ratio which the amount due to the petitioner bears to the total amount still unpaid on all outstanding bonds of series E including also those which have not yet matured. The principal question for determination is whether the petitioner is entitled to payment in full from the bond redemption fund, there being sufficient funds for payment to it in full, although not sufficient to pay in full all of the matured claims against said fund; or whether it must accept payment on some

pro rata basis to be determined." The court referred to Rohwer v. Gibson, 126 Cal.App. 707, 14 P.(2d) 1051, and pointed out that it was there concluded that where the sources of the bond redemption fund were not fortified by the authority to resort to a general or "inexhaustible" taxing power, the fund becomes a trust fund to be shared by all who hold claims against it without priority one over the other; and that it was appropriately held that where such a fund was insufficient to pay in full all who had claims against it, the petitioner was entitled only to share ratably with the other bondholders. The court further stated that the trust status of the fund has been considered appropriate where it is theoretically replenishable by a so-called inexhaustible taxing power, but the exercise of that power is rendered fruitless by reason of economic conditions resulting in a tax-collecting incapacity. In denying the writ of mandate the court said: "The same duty arises to divide the funds ratably when it appears that there will not be sufficient to pay all bonds in full, whether or not all are technically presented for payment. No contention is made by the petitioner that there does not in fact exist an insufficiency resulting by virtue of the large percentage of delinquencies and the consequent inability of the city to realize from all available sources sufficient to pay all bonds in full from the redemption fund. With a large percentage of delinquencies and a reduction of the tax-collecting capacity to furnish a surplus in the general fund wherewith to replenish the bond redemption fund, either now or in the reasonably near future, by the amounts of improvement assessment installments falling due on delinquent property subsequent to its sale to the city, it can scarcely be doubted that the city has properly declared the bond redemption fund insolvent." The court cited Morris, Mather & Co. v. Port of Astoria, 141 Or. 251, 15 P.(2d) 385, a case in which the pro-rata rule was applied.

[1, 2] Petitioner relies upon the general rule that where resort may be had to an inexhaustible taxing power the owner of bonds first to sue may recover the amount available in the fund. But the answer of defendant showed that the taxing power was not inexhaustible and that the district was in fact insolvent. Evidence should have been permitted to substantiate the allegations of the answer.

[3, 4] Petitioner criticizes the answer and contends that the allegations showing the insolvent condition of the district are insufficiently set forth, especially referring to the fact that certain allegations are made upon information and belief. The demurrer was general and not special. A failure to state any fact or facts in a pleading essential to a recovery or a defense may be reached by a general demurrer, but if the facts be stated imperfectly the demurrer, to be effectual, must be special and directed against the defect in question. Singh v. C. H. & O. B. Fuller Co., 39 Cal.App. 613, 179 P. 710; Harnish v. Bramer, 71 Cal. 155, 11 P. 888. Petitioner may not rely upon the assumption that all of the bonds are fortified by an inexhaustible taxing power when defendant was erroneously prevented from proving the insolvency of the district which issued them.

[5, 6] Petitioner asks us to dismiss the appeal upon the contention that defendant is not an aggrieved party, citing section 938 of the Code of Civil Procedure, and relying upon the general rule that as between the parties interested in the estate, executors, receivers, and other custodians of funds are not ordinarily affected by orders in reference to their disposition and therefore will not be heard on appeal from such orders. This general rule is limited in its scope and does not become operative in cases involving the construction of the proper exercise of the duties of the officer presenting the appeal. Lack of personal interest does not prevent a public officer against whom a writ of mandate has been issued from prosecuting an appeal. Moore v. Muse, 47 Tex. 210; In re Kenney, 153 App.Div. 325, 137 N.Y.S. 1097. The rule that an executor does not represent any of the heirs as against the others and therefore may not appeal from a judgment determining the rights of the heirs among themselves is subject to the qualification that the executor has the general duty of protecting the estate. In Re Estate of Snowball, 156 Cal. 235, 104 P. 446, 447, the executrix appealed from an order making a family allowance to two minor children. In upholding her right of appeal the court said: "The appellant, in her own behalf, has no sufficient interest in the matter at issue to entitle her to maintain an appeal. She has no personal interest in the estate, and hence she is not a party aggrieved. As executrix she has, abstractly speaking, a duty to perform in protecting

the estate from depletion by an extravagant family allowance. She is therefore as executrix technically a party aggrieved, and as such she has a right to maintain the appeal." In re Estate of Welch, 106 Cal. 427, 39 P. 805, is a case in which the court upheld the right of a special administrator to appeal from an order directing him to pay the arrearage of family allowance which had accrued. The court referred to the general rule and stated: "But this rule has its well-defined limitations. Wherever an order or decree involves a construction of the proper exercise of the duties of the officer, wherever it presents a question as to the right or power of the trustee to comply with it, wherever obedience to it might subject him to liability, the rule does not operate. Even where the order is one merely for the payment of funds, if any of these questions arise under it, and personal liability may attach, the right of the officer to appeal is recognized and upheld." In Cavanaugh v. Art Hardware & Mfg. Co., 124 Wash. 243, 214 P. 152, a receiver gave notice to the creditors of the corporation for the presentation of claims. Some of the claims were allowed by the court as preferred claims. The receiver appealed and a motion to dismiss the appeal was denied on the ground that the receiver appealed as a representative of the general creditors who were aggrieved by the order of the court. A similar decision was made in Northern Nevada Loan Ass'n v. Cazier & Sons Co., 49 Nev. 115, 239 P. 395, 396, wherein the court said: "A receiver may appeal from any order affecting his proper duties or personal rights, or where the estate as a whole is interested." See, also, In re Estate of Heydenfeldt, 117 Cal. 551, 49 P. 713; In re Estate of Hubbell, 121 Cal. App. 38, 8 P.(2d) 530.

[7] As above pointed out, if the trial court had permitted defendant to prove the allegations of the answer and findings had been made in accordance therewith, defendant would have been the custodian of a "trust fund to be shared by all who hold claims against it without priority one over the other." The treasurer of the city alone was made defendant and only part of the bondholders have intervened in the case. For aught that appears, a number of the bondholders may not have been informed of the pendency of the proceeding. All of the bondholders have an interest in the bond redemption fund and defendant as custodian of the fund is the representative of all of the bondholders with the duty of seeing that it is legally disbursed. She had the right to appeal from an order which adversely affected the interest of some of the bondholders and which determined her duty with reference to the fund. In Strasburger v. Van Delinder (Cal.App.) 62 P.(2d) 387, although the right to appeal was not discussed, the court entertained an appeal by a county treasurer in a mandamus proceeding in which the treasurer was ordered to pay a certain amount due on bonds of a road improvement district, the treasurer claiming, as here, that the funds should be prorated.

The judgment is reversed.

We concur: CRAIL, P. J.; McCOMB, J.



20 Cal.App.2d 745

THOMPSON v. LESTER et al.

Civ. 10291.

District Court of Appeal, First District, Division 1, California.

May 11, 1937.

1. Appeal and error ⇐1011(1)

On appeal from order based on affidavits, District Court of Appeal is bound by same rule as in reviewing oral testimony, and hence must take as true affidavits in prevailing party's favor when conflicting.

2. Dismissal and nonsuit ⇐57

Court may dismiss action for unreasonable delay in service of summons, regardless of merits or demerits of cause of action.

3. Appeal and error ⇐973

Order dismissing action for unreasonable delay in service of summons will not be disturbed on appeal, unless court's discretion was abused.

4. Process ⇐63

Plaintiff's lack of diligence in serving summons on defendant is not excused by pendency of other proceedings.

5. Dismissal and nonsuit ⇐57

Dismissal of action for balance due on note secured by trust deed after sale of

realty thereunder for unreasonable delay in serving summons *held* not abuse of court's discretion, where summons was served on one defendant over fourteen months after complaint was filed, other defendants were not served until after filing of motion to dismiss, and there was evidence that defendants lost rights to relief under Moratorium Act because of delay and that property was sold for less than its reasonable value, though plaintiff claimed that delay was due to fact that he was awaiting decision of pending action, involving statute relating to such sales, between other parties (Civ.Code, § 2924½, as added by St.1933, p. 1674).

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Floyd Thompson against Nathan L. Lester and others. From an order dismissing the action for delay in service of summons, plaintiff appeals.

Affirmed.

Thomas A. Thacher, Harrison A. Jones, W. Kevin Casey, and Thacher, Jones & Casey, all of San Francisco, for appellant.

Brobeck, Phleger & Harrison, of San Francisco, for respondents.

PER CURIAM.

An appeal from an order dismissing an action for delay in the service of summons.

The action was brought to recover the balance unpaid on a promissory note secured by a deed of trust after a sale thereunder of certain real property. The sale was made to the holder of the note on November 19, 1934, and the complaint was filed on February 16, 1935. Service of summons was made on defendant Ethel G. Lester on April 17, 1936. None of the other defendants was served until after the motion to dismiss was filed. The motion was made and granted on the grounds that the action had not been prosecuted with reasonable diligence and that there had been an unreasonable and inexcusable delay in the service of the summons.

Plaintiff contended that defendants had evaded service; but the evidence by affidavits—which the court believed—showed the contrary. He also claimed that the delay was due to the fact that he was awaiting the decision of a pending action between other parties which involved section 2924½ of the Civil Code, as added by St.1933, p. 1674, relating to sales under mortgages and deeds of trust. There was also evidence that defendants, owing to the delay, lost certain rights to relief under the Moratorium Acts, and that the property was sold for less than its reasonable value.

[1] In considering an appeal from an order based on affidavits, this court is bound by the same rule which controls when oral testimony is presented for review and when conflicting, those in favor of the prevailing party must be taken as true. Doak v. Bruson, 152 Cal. 17, 91 P. 1001; Patterson v. Keeney, 165 Cal. 465, 132 P. 1043, Ann.Cas. 1914D, 232.

[2-4] The power of the court to dismiss for unreasonable delay in the service of summons is well settled. Feather River, etc., Co. v. Paradise Irr. Dist, 3 Cal.(2d) 733, 46 P.(2d) 147. This is without regard to the merits or demerits of the cause of action [Bell v. Solomons, 162 Cal. 105, 121 P. 377]; and the order will not be disturbed unless the court's discretion has been abused [Lieb v. Lager, 9 Cal.App.(2d) 324, 49 P.(2d) 886]. A plaintiff's lack of diligence is not excused by the fact that other proceedings are pending (Kreiss v. Hotaling, 99 Cal. 383, 33 P. 1125; Watterson v. Hillside Water Co., 42 Cal.App. 364, 183 P. 592); and delays for periods approximating that in the case at bar have been held sufficient to justify a dismissal [Feather River, etc., Co. v. Paradise Irr. Dist., supra; Marks v. Keenan, 148 Cal. 161, 82 P. 772; Bernard v. Parmelee, 6 Cal.App. 537, 92 P. 658; Bryson v. Harryman, 118 Cal.App. 588, 5 P.(2d) 665.]

[5] The circumstances here shown were sufficient to support the conclusion that the delay was unreasonable and that the defendants were prejudiced thereby; and we cannot say that there was an abuse of discretion.

The order is affirmed.

CALIFORNIA REPORTER

IN VOLUME

68 PACIFIC REPORTER
SECOND SERIES

8 Cal.2d 694

LANDRETH v. DUCOMMUN.

L. A. 15724.

Supreme Court of California.

May 13, 1937.

1. Appeal and error ⇐878(1)

On appeal from judgment against maker of note, Supreme Court would examine into propriety of order vacating prior order terminating proceedings for a record and relieving defendant from his default in connection therewith, where plaintiff had noticed an appeal from order vacating the prior order, which appeal was dismissed on ground that order was nonappealable.

2. Appeal and error ⇐607(1)

Trial court did not abuse its discretion in vacating prior order terminating proceedings for a record and relieving defendant from his default in connection therewith, where affidavits and counter affidavits were sharply conflicting, and hence reporter's transcript was available to defendant on appeal.

3. Bills and notes ⇐537(4)

In action by transferee on note given in payment for rights in invention, question whether note was procured through fraud *held* for jury (Civ.Code, §§ 3133, 3136, 3139).

4. Bills and notes ⇐348

Holder who came into possession of note almost five months after date of maturity *held* prima facie not "holder in due course," as regards availability of fraud as defense in action by such holder on note (Civ.Code, §§ 3133, 3136, 3139).

In Bank.

Appeal from Superior Court, Los Angeles County; Minor Moore, Judge.

Action by N. E. Landreth against E. F. Ducommun, also known as Edmond F. Ducommun. Judgment for plaintiff, and defendant appeals.

Reversed and remanded, with directions.

Prior opinion, 61 P.(2d) 1227.

Oliver O. Clark and Reay, Scharf & Reay, all of Los Angeles, for appellant.

Arthur F. Larrabee and C. E. McDowell, both of Los Angeles, for respondent.

PER CURIAM.

This is an appeal from a judgment entered upon a directed verdict in favor of the plaintiff in an action on a promissory note. The cause was originally appealed to the District Court of Appeal of the Second Appellate District, wherein the respondent urged, among other things, that the reporter's transcript was improperly before the court and should not be considered. This contention, if accepted, would have resulted in the disposition of the appeal on the clerk's transcript of the judgment roll. However, contrary to respondent's contention, the District Court of Appeal considered both transcripts and reversed the judgment upon the evidence appearing in the reporter's transcript. Based on a petition addressed exclusively to this issue concerning the record, we granted a hearing herein not because of any dissatisfaction with the conclusion announced by the District Court of Appeal on the point, for we are of the opinion that the reporter's transcript may properly be considered, but because of our inability to accept the reasons advanced therefor.

It appears that, after the defendant had noticed his appeal from the judgment, the plaintiff and respondent moved the trial court to terminate the proceedings for a record to be used on appeal, which motion was granted. Later, the defendant and appellant moved the trial court for relief under section 473 of the Code of Civil Procedure (as amended by St. 1933, p. 1851). Relief was granted and the reporter's transcript was thereupon settled. The plaintiff, respondent herein, then noticed an appeal from the order vacating the prior order terminating proceedings for a record to be used on appeal from the judgment and granting relief under section 473, supra. The latter appeal was dismissed (Landreth v. Ducommun, 9 Cal. App.(2d) 136, 48 P.(2d) 984) on the ground that the order was nonappealable, the opinion stating that any attack on said order should be made on appeal from the judgment. The cited decision has become final and is the law of the case. Moreover, it is supported by the authorities. Buis v. Lindauer Corporation, 116 Cal.App. 558, 560, 561, 3 P.(2d) 18; McWilliams v. Hudson, 98 Cal.App. 185, 188, 189, 276 P. 598, 277 P. 529.

[1, 2] Accordingly, we have on this appeal from the judgment examined into

the propriety of the order vacating the prior order terminating the proceedings for a record and relieving defendant and appellant from his default in connection therewith. The affidavits and counter affidavits offered in connection with the motion are sharply conflicting in many respects. They were considered and weighed by the trial court, as a result of which some credence was attached to the averments in the defendant's affidavits to the effect that his delay in presenting the transcript was due to inability of the reporter to complete it and the belief that other somewhat similar and related cases which had been tried first were to be heard first on appeal. We perceive no abuse of the broad discretion vested in the trial court in matters of this character and we are therefore of the view that the reporter's transcript was properly settled and certified and is available to the defendant and appellant on this appeal from the judgment.

We are satisfied that the District Court of Appeal has properly disposed of the appeal on its merits and we adopt as and for the decision of this court the following portions of the opinion heretofore prepared by Mr. Justice Desmond, sitting pro tempore:

"Plaintiff, as sole endorsee, brought suit upon a $10,000 note signed by defendant on February 25, 1931, and made payable to the order of George A. Smith. After both sides had rested, the court upon plaintiff's motion directed the jury to render a verdict in her favor. From the judgment entered thereon, defendant appeals, claiming that there was sufficient valid evidence offered by way of defense to require submission of the case to the jury. Complaint is made also that the trial court abused its discretion in refusing to permit certain proposed amendments to defendant's answer; further, that the court erred in rejecting evidence tending to establish fraud and rescission. The additional point is made that at a time prior to the trial of this case error arose when a judge sitting in the law and motion department ordered stricken certain allegations of defendant's answer. * * *

"We turn first to the pleadings and find that the defendant, answering the suit of plaintiff, urges the same defenses that were successfully relied upon in a similar suit brought against him by Smith personally, as payee of four other notes dated May 20, 1931, for $12,500 each. This deal for $50,000 represented by the four notes was an outgrowth of the transaction in which the $10,000 note, the subject of the present action, was given.

"George A. Smith had applied on March 5, 1930, for letters patent on a vehicle turntable designed to operate in small yards or garages, where restricted area or hilly ground would prevent easy turning about or changing direction of an automobile. On July 15, 1930, Smith joined with one A. T. Lawrence in assigning to Ducommun, defendant here, at a price of $10,000, a one-third interest in a partnership having an exclusive license to deal in Los Angeles county, with such rights in the invention as might be secured from the United States patent office. In the following February, Smith sold to Ducommon his interest in this partnership and granted to him an option to buy, prior to August 1, 1931, for the sum of $50,000, the exclusive rights under the patent application within the state of California. The consideration for the partnership interest and the option was $5,000 cash and the promissory note for $10,000 that forms the basis of the present suit. On May 4th following, Lawrence sold his one-third interest in the partnership to Ducommun for $10,000 or thereabouts, and on May 29, 1931, instead of conveying merely the California territory to Ducommun for $50,000, as contemplated by the February 25th option, Smith sold him, for the four notes aggregating $50,000, the exclusive right 'to make, use and vend * * * in the whole of the United States, except the State of Oregon and the County of Los Angeles.' The agreement between the parties, however, bound Ducommun to organize a corporation which would pay Smith a royalty of $20 on each turntable manufactured, minimum fixed royalties to be paid monthly (otherwise the license to be forfeited) and Smith to receive 1000 shares of stock at $100 each, of the new corporation, as well as a salary of $500 per month as consulting engineer over a five-year period.

"The first of the $12,500 notes matured May 29, 1932, and not being paid, suit was brought upon all four notes (possibly under a provision for acceleration), resulting in a verdict and judgment in favor of defendant Ducommun. Meanwhile, Smith had died and the administrator of

his estate, his associate Lawrence, was substituted as plaintiff, and prosecuted an appeal which was unsuccessful, as appears by reference to Lawrence, Admr., v. Ducommun, 14 Cal.App.(2d) 396, 58 P.(2d) 407. That opinion, in abbreviated form, presents the conditions under which the various notes signed by this defendant were obtained from him, stating at page 398 of 14 Cal.App.(2d), at page 408 of 58 P.(2d), 'It is sufficient to say that Smith and Lawrence, aided and abetted by Reverend A. B. Gardner, a psychic divine, known as "Mother Gardner," who conducted and operated "The Church of the Open Door of Truth," and who held herself out as being able to give business and financial advice obtained from "divine" psychic sources, practiced with success a series of impositions upon defendant to their mutual profit, although the lion's share went to Smith. With the constant help of Lawrence and the continuous "divine" assistance of "Mother Gardner," Smith managed to administer the final coup de grace to defendant in the form of the contract referred to. Before the blow was dealt, however, there were a variety of representations made, all of which the evidence in a superabundance reveals to have been without a basis in fact. Some of these representations were as follows:

"'(1) That this turntable was perfected excepting for a few minor improvements.

"'(2) That Smith had spent $40,000 in perfecting this device.

"'(3) That Smith had five bona fide orders for this turntable.

"'(4) That Lawrence had paid Smith $10,000 for a one-half interest in the Los Angeles county rights to this turntable device.

"'(5) That this device could be manufactured and sold at a profit of $200 to $300 per table.

"'(6) That there was a great demand for said product.'

"The opinion then goes on to say that the 'defendant pleaded several defenses, including fraud, rescission, and failure of consideration.' We have the same defenses set up in the present case, particular emphasis being laid on fraud based upon the same representations as are listed in Lawrence, Adm'r, v. Ducommun, supra. We note that the answer states that the various untrue statements attributed to George A. Smith, A. T. Lawrence and A. B. Gardner were made 'to defraud the defendant and to induce him, the defendant, to execute the said note and pay said money and purchase said George A. Smith's interest in said copartnership and to take said option, hereinabove referred to; that the defendant did July 1, 1932, learn that said representations and each of them were false and untrue.'

[3] "Having read the transcript and examined the exhibits introduced upon this trial, we feel that, restricted as defendant was, by orders striking from his answer certain pertinent allegations, and also by rulings that prevented his amending his answer, he did succeed, nevertheless, in presenting substantial evidence upon which a jury might have found that he was the victim of fraud practiced upon him in pursuance of a common plan by Smith, Gardner and Lawrence.

[4] "Fraud is available as a defense against the holder, not in due course, of a negotiable instrument (see sections 3133, 3136, 3139, Civ. Code), and in this case it appears that plaintiff came into possession of defendant's note almost five months after its date of maturity. Therefore, prima facie at least, she is not a holder in due course. It is true that she alleged in her complaint that a few days prior to her receiving the note, the time for its payment was extended by a letter written to Ducommun and for a valuable consideration, to a date approximately six months in the future, namely, August 25, 1932, but this allegation was denied by defendant and no proof of it was made upon the trial; it is apparent, therefore, that it could not and did not have any bearing upon the court's decision to order a verdict for the plaintiff."

The judgment is reversed and the cause remanded for a new trial, with directions to the superior court to consider such applications as may be made for amendment of the pleadings.

8 Cal.2d 712

ORANGE COUNTY v. TOLIVER et al.

L. A. 15504.

Supreme Court of California.

May 17, 1937.

Agriculture ⇐8

Under provisions of Agricultural Code creating lien in favor of county from date of payment for labor and materials necessary for eradication of agricultural pests on property from which nuisance "has been removed or abated," and requiring recording within thirty days after right to lien has accrued, lien, which is in nature of mechanic's lien, accrues only on both doing of work and use of materials and payment therefor, and not merely on payment (Gen.Laws Supp.1933, Act 144, §§ 136, 137).

In Bank.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Proceeding by Orange County against Wood O. Toliver and others. From an adverse judgment, defendant Emma L. French appeals.

Affirmed.

Rutan, Mize & Kroese, of Santa Ana, for appellant.

S. B. Kaufman and H. A. McCabe, both of Santa Ana, for respondent.

THOMPSON, Justice.

This is an appeal from a judgment holding valid a lien on the property of the defendants in favor of the County of Orange in the sum of $113.97, the cost of labor and materials used in the abatement of scale on the defendants' orange trees. The county entered and sprayed the orchards under authority of the Agricultural Code. Deering's Supp. 1933, Act 144. The appellant does not question that portion of the lien covering labor expense but, with respect to $53.04, for cost of materials, it is contended that the notice of lien was not filed within the time required by law. Section 137 of the Agricultural Code.

The Agricultural Code provides that, when the owner of premises found to be infested does not himself abate the nuisance after notice has been given him to do so, the county agricultural commissioner shall cause it to be abated by eradicating or controlling the pests. Section 136. Section 137 provides that the expense thereof shall be a county charge, payable from the general fund of the county; that "from the date of payment the amount thereof shall be a lien on the property from which said nuisance has been removed or abated" and that "notice of such lien shall be recorded within thirty days after the right thereto has accrued."

The facts are stipulated. Materials used in the spraying of the orchard were spray oil and spreader. These the county bought in large lots as an economy measure rather than in amounts sufficient only for each particular job. The spraying of the orchard was done between March 16 and 21, 1934. The last lot of spray oil purchased by the county prior to that time was paid for by county warrant October 10, 1933, and the last spreader purchased by the county and placed in the large supply lot was paid for by county warrant on November 1, 1933. Spray oil and spreader used on appellant's orchard were drawn from the county's supply and charged against the property by the county agricultural commissioner on April 4, 1934. Also on April 4, 1934, the county paid out of its general fund $60.93 for labor in spraying the orchard and charged it against the property. The notice of lien was filed May 2, 1934. Because the notice of lien was not filed within thirty days of the date upon which the county paid for the spray oil and spreader used upon her property, the appellant contends the lien for the cost of the materials is invalid. The trial court found that the spraying of the grove was one transaction and that the lien, notice having been filed within thirty days of the payment of the last item of costs incident thereto, was valid.

The sole question is one of construction of the statute. It is provided that notice of the lien must be filed within thirty days of the time when the right thereto accrued. It is also provided that from the date of payment of the costs by the county the amount thereof shall be a lien. We think the construction contended for by the appellant, that in order to preserve the lien the notice must be filed within thirty days of the time when the county pays for the materials regardless of the time when they are used upon the property against which their cost is to be charged, cannot be supported by reason.

The lien contemplated by the act is in the nature of a mechanic's lien. It is a lien

for the cost of materials furnished for use upon and labor expended upon the property of another. Obviously there can be no lien until the work is done or the materials are used upon the land against which they are to be charged. The language of section 137 itself makes it clear that the lien is to accrue when two prerequisites have been fulfilled: (1) The work of abating the nuisance has been done, and (2) the county has paid for it. The reason for the second requirement is, we think, obvious. It is to prevent a multiplicity of liens (of the county and of those who actually did the work or furnished the materials) and also because, until the county has been put to an expense, it has no right to be reimbursed. The language of section 137 is: "From the date of payment the amount thereof shall be a lien on the property from which said nuisance has been removed or abated." The only reasonable construction of such a provision is that the lien shall accrue when the work shall have been done and the county shall have paid for it. The first day upon which these conditions were fulfilled was April 4, 1934. It follows that the notice was filed in time.

The judgment is affirmed.

We concur: EDMONDS, J.; SHENK, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.



8 Cal.2d 734

HOPPER v. ELLIOTT et al. (COALINGA-KETTLEMAN OIL CO., Intervener).

L. A. 15675.

Supreme Court of California.

May 20, 1937.

On Petition for Rehearing June 17, 1937.

1. Mines and minerals ⇐36

As regards validity of placer mining location, reasonable belief in existence of oil under surface of lands does not constitute discovery, and is not substitute for knowledge required in lode claims.

2. Mines and minerals ⇐38(17)

Evidence *held* sufficient to sustain finding that there had not been necessary discovery to validate placer mining location, as regards validity of subsequent mineral lease to others (Federal Leasing Act § 19, 30 U.S.C.A. § 228).

3. Mines and minerals ⇐38(21)

Evidence *held* to support finding that placer mining location had been abandoned, as regards validity of subsequent mineral lease to others (Federal Leasing Act § 19, 30 U.S.C.A. § 228).

4. Mines and minerals ⇐36

In absence of sufficient discovery to validate placer mining location, even if there had been no abandonment in strict technical sense of the term, rights of locators and their successors lapsed under statute where they did not continue in diligent prosecution of work subsequent to 1913, justifying leasing of mineral rights to others (Pickett Act § 2, as amended, 43 U.S.C.A. § 142; Federal Leasing Act § 19, 30 U.S.C.A. § 228).

In Bank.

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action by B. M. Hopper against Amos W. Elliott and others, wherein the Coalinga-Kettleman Oil Company intervened. From judgment for defendants, the plaintiff and intervener appeal.

Affirmed.

David Peckinpah, of Fresno, and W. H. Metson, C. F. Rafferty, and A. H. Ricketts, all of San Francisco, for appellant B. M. Hopper.

Randolph V. Whiting and Henry F. Wrigley, both of San Francisco, and John F. Pryor, of Hanford, for appellant Coalinga-Kettleman Oil Co.

A. L. Weil, of San Francisco, P. C. Black, Martineau & Stratton, L. R. Martineau, Jr., Warren Stratton, and George W. Nilsson, all of Los Angeles, and John G. Covert, of Hanford, for respondents.

THOMPSON, Justice.

The plaintiff is one of eight persons who on the 10th day of September, 1909, posted notice of a placer mining location on the N.W. ¼ of section 2, township 22 south, range 17 E. M. D. M., and being 160 acres of the public domain in the Kettleman Hills district. A copy thereof was recorded in the office of the county recorder of Kern county on the 28th day of November, 1909, which was one day after the President of the United States

made his order withdrawing the lands from entry. This action was commenced for the purpose of quieting plaintiff's title to the property against the claims of the defendants. The complaint in intervention alleges that the intervener Coalinga-Kettleman Oil Company has succeeded to the title to the oil placer location and it is prayed that its title thereto be quieted. However, it should be observed at this juncture that there was in truth no conflict between intervener and plaintiff, the contest being between plaintiff and intervener, on the one side, and the defendants on the other. Judgment was rendered after trial in favor of the defendants, and the plaintiff and intervener prosecute this appeal therefrom.

While the case is interesting, the salient facts are not complicated. Following recordation of the notice of location and in the spring of 1910, the locators quitclaimed their interests to the Echo Oil Company, in which the locators were interested, which company entered into a drilling contract with the K. H. Oil Company, whereby the Echo Oil Company deposited a deed to the property in escrow to be delivered to the K. H. Company when it should have drilled a well to a depth of 4000 feet "unless oil in paying quantities" were discovered "at a lesser depth." The K. H. Company assigned its interest in the contract to the intervener about the month of June, 1910. Lumber for a derrick was hauled in commencing in March of 1910, but the well was not spudded in until some time in June of that year. Drilling proceeded until a depth of about 4,010 feet was reached about August, 1911, when operations ceased. Somewhere between six and nine months thereafter drilling was resumed and the hole carried down to a depth of 4,812 feet, which occurred during the early part of 1913. At that time the work was stopped; the casing was taken out of the hole; the derrick, boilers, and engine were taken down; and the pipe and other materials hauled away. No more work of any kind was done by the appellants, or either of them.

However, on February 25, 1920, the Federal Leasing Act (section 19, 30 U.S.C.A. § 228) became law, and during April or May of that year the respondent Elliott made application for an oil and gas prospecting permit, which was granted October 30, 1920. Elliott assigned his permit to the Coast Land Company, which company assigned to the Marland Oil Company. Oil was discovered in 1928, at a depth of about 7,000 feet. In 1929 the government issued leases to the Marland Oil Company covering this and additional property. These leases subsequently came into the hands of Continental Oil Company by assignment. At the time of the trial nine wells had been drilled on the property covered by the Elliott permit, and there had been expended on the quarter section involved for drilling operations something in the neighborhood of $400,000.

This action was commenced in the early part of 1932, or about nineteen years after appellants walked off the property in 1913. The case was tried in 1933, and the court made its findings by which it declared (stated briefly) that appellants were not engaged in any work on the land at the time of the withdrawal thereof from entry by the President of the United States; that appellants have not performed any assessment work on the property since 1913, and they failed to make discovery of petroleum oil or other valuable minerals within the property; that leases from the United States Government came into the hands of the Continental Oil Company, as outlined above; that the deed executed by Echo Oil Company to the K. H. Oil Company and placed in escrow as already recited was never delivered to either the K. H. Oil Company or to the Coalinga-Kettleman Oil Company; and "that in the spring of 1913 said Coalinga-Kettleman Oil Company, having failed to discover oil, abandoned said well, removed its derrick, pulled and sold its casings, and completely abandoned said placer mining claim and property and thereafter permitted its corporate records to become lost and its corporate charter to lapse and sat by for approximately nineteen years, making no claims to said property until after the same had been developed at the expense of the defendants herein"; that the United States has an interest in the lands, both as owner of the fee and as lessor in the leases mentioned, and is not made a party to the action; and that the defendant Kettlement North Dome Association is in possession by virtue of an agreement between the owners and operators of property in the north dome of Kettlement Hills providing for unit operation thereof.

The various claims and arguments of appellants may be stated as follows: That they had a valid mining claim upon which

they were diligently at work at the time of the withdrawal order and at all times thereafter; that all property covered by valid and subsisting claims were excluded from the prospecting permits; that the United States Government could not lawfully include property so covered by the leases; that advantage may not be taken of their failure to do assessment work commencing in 1913 by anyone other than a relocator; and that the property was not in fact abandoned, but in truth oil was discovered and their right to the property perfected thereby.

It becomes immediately apparent that if the finding of the court to the effect that there was no discovery, or the one that the property was abandoned or one to the effect that the United States is a necessary party, is supported by the evidence, the judgment must be affirmed. Our conclusion is that not only must the judgment be affirmed because these findings are supported, but also for other reasons which we shall mention hereafter.

It is a conceded fact that the oil producing formation in the Kettlement Hills district is the Temblor or Vaqueros stratum which, at the place where the well of appellants was drilled, is about 2,000 feet below the deepest point reached by them, and also that appellants never did attempt to put the hole they drilled on production. Witnesses for the appellants testified to gas pressure and to oil scum on the water and to oil markings on the derrick and to oil stain discoverable by an ether bath on the sand which came from the bailer. One witness for plaintiff testified on cross-examination that after the mud and other fluid had been going into the sump for two or three weeks he supposed "if you whipped it all up you would have a couple of barrels of oil, whipped it out of the mud so it would come up and you could work it." Another witness on cross-examination stated: "Sometimes after we tried to bail the well down, that is taken the water [test] out, sometimes there would be quite a little bit, maybe a couple of barrels in the sump hole, and sometimes you could hardly see any at all." While another witness, a geologist, gave it as his opinion that had the well been put on production it would have produced about one hundred barrels of oil per day, yet this witness in 1921 made an affidavit in support of the application of the K. H. Oil Company, the parent company of the Coalinga-Kettleman Company, in which it was stated in pursuance of the provisions of the Leasing Act that: "The affiant had previously performed all acts on said land as a mining claim except to make discovery and that discovery had not been made on said lands prior to the passage of said Act of Congress." This same witness in a report rendered by him in 1930 in referring to the well drilled said: "Because of the inadequacy of the machinery then in use in drilling work it was impossible to go more than 5000 feet, so that efforts to reach the oil zone at that time were futile." Other similar statements of this witness were introduced. Another witness who testified for plaintiff to the effect that there were showings of gas and oil admitted that in 1915 or 1916 he gave testimony to the effect that they never got a trace of oil. But above all is the fact that in 1913 the appellants dismantled the property, removed those things which were apparently of value, and walked off the property. The defendants not only produced evidence establishing beyond doubt that the Vaqueros formation is the producing one in the district, but also introduced the testimony of experts to the effect that no estimate of any value can be made of the probable productivity of a well other than by an actual production test, for the reason that organic materials are widely distributed and laid down in nearly all sedimentary beds, as a result of which, when in drilling such a bed is penetrated, the driller will get some showing of gas and small quantities of oil, but the concentration of hydrocarbons resulting from the distilled organic material so as to form an oil field or pool is relatively rare. The question at this juncture is: Does the evidence support the finding that there was no discovery?

[1] Before an answer may be properly given, we must first dispose of appellants' contention that belief in the existence of oil under the surface of the lands is substituted for the knowledge required in lode claims. The origin of what we consider a misapprehension of the law by appellants lies in the protection which must be afforded the bona fide locators of oil property during that period when they are diligently at work in an effort to make discovery. See McLemore v. Express Oil Co., 158 Cal. 559, 112 P. 59, 139 Am.St. Rep. 147, and Borgwardt v. McKittrick Oil Co., 164 Cal. 650, 130 P. 417. But

the protection of this *inchoate* location made upon reasonable belief is no precedent or premise from which to argue that discovery may consist of a reasonable belief in the presence of oil underneath or within the land thus located. A reading of the opinion in Miller v. Chrisman, 140 Cal. 440, 73 P. 1083, 74 P. 444, 98 Am.St.Rep. 63, and Chrisman v. Miller, 197 U.S. 313, 25 S.Ct. 468, 471, 49 L.Ed 770, demonstrates that in so far as what constitutes discovery is concerned the test with regard to oil placer locations is not different from that of the lode location. In the last-mentioned opinion the Supreme Court of the United States said, after quoting the general rule from Iron Silver Min. Co. v. Mike & Starr Gold & Silver Min. Co., 143 U.S. 394, 430, 12 S.Ct. 543, 36 L.Ed. 201: "There was not enough in what he claims to have seen to have justified a prudent person in the expenditure of money and labor in exploitation for petroleum. It merely suggested a possibility that the ground contained oil sufficient to make it 'chiefly valuable therefor.'" See, also, U. S. v. McCutchen (D.C.) 238 F. 575–590. We have found nothing in the authorities relied upon by appellants changing or altering the definition of discovery as applied to oil. Those cases which deal with actions commenced by the United States to set aside grants of agricultural land because of the belief of the patentee that they were in fact oil-bearing lands are obviously not persuasive here.

[2] Reverting, therefore, to the question, it seems to follow that the court was amply justified in finding that there was no discovery tested by the rule that the mineral must be found in such quality and quantity as to inspire a person of ordinary prudence in the further expenditure of his labor and means. At this juncture it is pertinent to again ask if oil of such quality and quantity were discovered, why did appellants leave the property to again revert by natural processes to its virgin state?

[3, 4] In natural order we may briefly discuss whether the evidence was sufficient to support the finding of abandonment. It is not necessary to go into details. The evidence establishes that after the work was stopped the casing was pulled, the derrick dismantled, and the boilers, engine, and pipe hauled away. No further work was done on the property. In fact, appellants did nothing until preparations were made to file this action. It cannot seriously be contended that such testimony is insufficient to support the finding. But assuming the merit of such a plan for a moment: The Pickett Act, § 2, as amended (43 U.S.C.A. § 142), which confirmed and approved withdrawal of public lands from oil entries, provided that it should not affect bona fide occupants or claimants of oil or gas-bearing lands who at the date of the withdrawal order were diligently prosecuting work thereon "so long as such occupant or claimant shall continue in diligent prosecution of said work."

In the absence of a sufficient discovery to validate the location and assuming contrary to the finding that there was no abandonment in the strict sense of the term, it cannot be denied that appellants did not continue in the diligent prosecution of work subsequent to 1913, and any rights theretofore existing lapsed under the provisions of the act just quoted. See discussion in U. S. v. McCutchen (D. C.) 238 F. 575, and U. S. v. Chanslor-Canfield Midway Oil Co. (D. C.) 266 F. 142.

Perhaps our treatment of the case might properly terminate at this point, but the respondents contend, and the court found, that the United States was a necessary party. Very recently the District Court of Appeal passed upon this question in the case of Livermore v. Beal (Cal.App.) 64 P.(2d) 987, and we are in accord with what was said in that opinion. No other points require decision.

Judgment affirmed.

We concur: SHENK, J.; CURTIS, J.; SEAWELL, J.

I concur in the judgment: LANGDON, J.

On Petition for Rehearing.

The petition for a rehearing herein is denied, and for the reason that said petition for rehearing contains scandalous and offensive matter, said petition is ordered stricken from the files.

Mr. Justice LANGDON dissents from the foregoing order.

Mr. Acting Chief Justice SEAWELL dissents from that part of the order striking the petition from the files.

MARY PICKFORD CO. v. BAYLY BROS., Inc., et al. *

Civ. 11061.

District Court of Appeal, Second District, Division 1, California.

April 30, 1937.

Rehearing Denied May 29, 1937.

Hearing Granted by Supreme Court June 28, 1937.

1. Licenses ⇐18½

Under evidence that corporation was made beneficiary of realty development trust created by corporate trustor, trustee, and beneficiaries because of corporation's syndicate subscribers, and that officers of other corporate beneficiary solicited their friends for subscriptions of "assignments" of beneficiaries' interest, "assignment" *held* a "security offered for sale to the public," the sale of which without permit was prohibited by statute, notwithstanding that buyer knew purpose of trust (St.1925, p. 963, § 2, subsecs. 3, 7; St.1917, p. 675, § 3).

[Ed. Note.—For other definitions of "Offer for Sale" and "Security," see Words & Phrases.]

2. Licenses ⇐18½

Securities are "offered for sale to the public" within meaning of statutes defining "security" and requiring permit for sale thereof, though effort to sell is limited to that portion of public particularly susceptible to such offers (St.1925, p. 963, § 2, subsec. 7; St.1917, p. 675, § 3).

3. Licenses ⇐18½

That subscriber to stock in company about to be formed to deal in land knows that his money will be used to buy land and to carry on sales campaign does not alter character of article purchased, which is a "security" within meaning of statutes defining "security" and requiring permit for sale thereof (St.1925, p. 963, § 2, subsec. 7; St.1917, p. 675, § 3).

4. Licenses ⇐18½

Sale of security without permit was violation of statute requiring such permit, whether prior permits granted by commissioner of corporations enabled commissioner to learn of proposed realty development trust under which security in question was issued, and whether commissioner would have issued permit had application been made (St.1917, p. 675, § 3).

5. Limitation of actions ⇐37(2)

Cause of action of buyer because of sale of security without permit in violation of statute was one for "fraud," and was governed by statute of limitations applicable to action therefor (St.1917, p. 675, § 3; Code Civ.Proc. § 338, subsec. 4).

[Ed. Note.—For other definitions of "Fraud," see Words & Phrases.]

6. Licenses ⇐39

Ignorance of fact that permit for sale of security is lacking or that permit is required by statute does not relieve those whose duty it is to secure permit from liability (St.1917, p. 675, § 3).

7. Limitation of actions ⇐100(11)

Under three-year statute of limitations on action for fraud, running from discovery of fraud, it is only where party defrauded would plainly have discovered fraud except for inexcusable inattention that he will be charged with discovery in advance of actual knowledge, and where prudent man would not be put upon inquiry, fact that means of knowledge are open to party, and that he does not avail himself thereof, does not bar him from relief (Code Civ.Proc. § 338, subsec. 4).

8. Limitation of actions ⇐100(11)

Under evidence that buyer of security did not discover seller's lack of permit until within three years of buyer's action for fraud, and that buyer had no information which should have aroused his suspicion, action *held* not barred by three-year limitation, since presumption was that law had been obeyed, and buyer was not required to make inquiry (St.1917, p. 675, § 3; Code Civ. Proc. § 338, subsec. 4).

9. Licenses ⇐39

In action by buyer of security for seller's fraud in making sale without permit required by statute, for purposes of measuring damages, security would be deemed valueless, and buyer could recover full amount paid therefor (St.1917, p. 675, § 3).

10. Fraud ⇐59(1)

One who has by fraud been induced to part with property without receiving anything in return may recover at least value of what he has given.

11. Damages ⇐208(9)

Under statutes governing recovery of interest in action for damages "in the discretion of the jury," allowance of interest is

*For subsequent opinion see 86 P.2d 102.

confined to discretion of trier of facts, whether it be jury or court (Civ.Code, §§ 3287, 3288).

12. Damages ⇐69

In action by buyer of securities for seller's fraud in making sale without permit required by statute, trial court's allowance of recovery of interest from date of demand rather than from date of payment of sale price *held* discretionary (St.1917, p. 675, § 3; Civ.Code, §§ 3287, 3288).

13. Licenses ⇐39

Corporations which, without permit required by statute, sold security issued by them which represented interest in trust of which trust company became trustee after buyer subscribed for security *held* liable to buyer for fraud, notwithstanding that trust company was authorized to sell securities without permit (St.1917, p. 675, § 3).

14. Licenses ⇐39

Officers of corporation *held* liable for another officer's sale without permit of security issued by corporation, where such sale was part of general scheme promoted by such officers, notwithstanding officers' ignorance that permit was required by statute or was lacking (St.1917, p. 675, § 3).

15. Licenses ⇐39

Trust company, which was trustee of realty development trust and which prepared form to evidence interest of buyer under sale of corporate beneficiaries' interest in trust without permit required by statute, *held* not liable to buyer, where subscription was obtained before trust company became trustee, and security was issued by beneficiaries (St.1917, p. 675, § 3).

16. Licenses ⇐39

Officers of corporation in charge of campaign to sell securities are bound at their peril to know that permit is required by statute, but such duty is not imposed on all who may have connection with transaction but no part in sale or issuance of security (St.1917, p. 675, § 3).

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Action by the Mary Pickford Company and another against Bayly Bros., Inc., and others. From a judgment for plaintiffs, named defendant and certain other defendants appeal, and from adverse orders, plaintiffs and defendants Harold Bayly and Roy D. Bayly appeal.

Judgment reversed as to defendant California Trust Company; judgment otherwise affirmed, and orders affirmed.

Mott, Vallee & Grant, of Los Angeles, for appellants and respondents Mary Pickford Co. and Mary Pickford Fairbanks.

Swanwick, Donnelly & Proudfit and Finlayson, Bennett & Morrow, all of Los Angeles, for appellants and respondents California Trust Co.

Chapman & Chapman, Joseph K. Horton, and John S. Frazer, all of Los Angeles, for appellants and respondents Bayly Bros, Harold Bayly, Roy D. Bayly, Suburban Estates, Inc., and Edwards & Wildey Co.

BISHOP, Justice pro tem.

Without distinguishing between the plaintiff corporation and those individuals comprising an antecedent copartnership of the same name, one of whom was the plaintiff Mary Pickford Fairbanks, because to do so would be to add to the complexity of the complicated statement of facts in unessential particulars, it suffices for all our purposes to state that on October 31, 1925, the plaintiff corporation subscribed for a 25/530 beneficial interest in a real estate subdivision project, paying $2,500 down and the balance, $22,500, on December 12. Relying on the fact that no permit had been granted by the corporation commissioner for the issuance of the security thus purchased, the plaintiff filed its complaint August 2, 1933, asking judgment for $25,000 and interest from the dates of the two payments. From the judgment for $25,000 and interest from January 7, 1933, which was entered against them, these defendants have appealed: Bayly Bros., Inc., Harold Bayly, Roy D. Bayly, Suburban Estates, Inc., Edwards & Wildey Company (together with Walter C. Durst, trustee in bankruptcy of the company), and California Trust Company. Both the plaintiff and the defendants Harold and Roy D. Bayly made motions to have the judgment vacated and different judgment entered, and they have appealed from the orders denying their respective motions. We have reached these conclusions: The subject-matter of plaintiff's purchase was a security issued by the defendants Bayly Bros., Inc., and Edwards & Wildey Company; that the sale and issuance of the security was illegal and constituted a tort in the perpetration of which the defendants Harold and Roy D. Bayly participated and for the results of

which they are liable; that the action was commenced before the statute of limitations had erected a bar; that interest was properly awarded; and finally, that the defendant California Trust Company was not a party to the commission of the tort.

The plaintiff, we are informed by the findings, was approached by Bayly Bros., Inc., with a written proposition from Edwards & Wildey Company reciting (as the proposition was later amended) that Edwards & Wildey Company was forming a syndicate in the sum of $530,000 to complete the financing of the purchase, operation and subdivision of the 4,000-acre "Sunshine Ranch"; that out of the project each subscriber would be paid back the amount of his subscription and interest at 7 per cent. before any profits were distributed; that thereafter profits would be divided equally between the syndicate and Edwards & Wildey Company and its associates; that each subscriber's interest in the syndicate would be 1/530 for each thousand dollars subscribed and the syndicate would have a half interest in the trust; that "upon the close of the Syndicate, you shall receive a beneficial trust certificate setting forth your interest therein"; and that a 25/530 interest in the syndicate had been reserved for the plaintiff. This offer the plaintiff accepted October 31, 1925, and Bayly Bros., Inc., were paid $2,500 on account. A little later, December 19, 1925, a further payment of $22,500 was placed in the hands of Bayly Bros., Inc., in the form of a check drawn to the order of the California Trust Company and delivered to the trust company in escrow.

In the proposition presented to the plaintiff, the statement was made that it might be deemed advisable to have the Sunshine Ranch acquired by the Suburban Estates, Inc., a corporation being formed for the purpose. Evidently it appeared advisable, for we find the commissioner of corporations granting a permit December 8, 1925, authorizing the Suburban Estates, Inc., to issue 98,000 shares of its capital stock to Bayly Bros., Inc., and Edwards & Wildey Company, in consideration of an assignment of a contract to purchase real property, and subsequently, we discover, the Suburban Estates, Inc., conveyed the ranch and transferred the stock to the California Trust Company. The conveyance and transfer were made in trust, evidenced by a declaration of trust executed by the California Trust Company under date of December 24, 1925. We need not note all of the provisions of this declaration of trust; only those provisions which will help us to answer the questions, Were there securities illegally issued? Which of the defendants is liable for the illegal issue? need be regarded. From the declaration of trust it appears that the development, subdivision, and sale of Sunshine Ranch was to be undertaken; that from the proceeds received, an $800,000 obligation of the trustor, Suburban Estates, Inc., to the California Bank was to be met; that the trustor had made Edwards & Wildey Company its exclusive sales agent in the project and it was to receive certain designated sums as commissions; and that Bayly Bros., Inc., and Edwards & Wildey Company, termed the beneficiaries, had contributed a total of $490,000 in "money, property and/or services," which was to be repaid them with interest. This sum of $490,000, it is evident, took the place of the sum of $530,000 first stated to be the goal of the syndicate; plaintiff's fractional interest, 25/490, was larger by the corresponding reduction in its denominator. By a further recital we are informed that capital stock of the trustor to the total amount of $490,000 par value had been transferred to the trustee.

The balance of the money received from the sale of lots, after the trustee's fees, agent's commission, and a percentage for the general improvement fund had taken their toll, was to be divided, at first, 7/11 to the bank and 4/11 to the trustor. When the trustor had received $300,000, then all was to go to the bank until its $800,000, and any further advances it might have made, were repaid. Thereafter all the balance was to go to repay the beneficiaries the sum of $490,000 and interest. When this sum was repaid, then the trustor was to receive the balance. By the time the various sums indicated had been paid out and the trustor had become the sole recipient of the portion of sales receipts not allocated to the general improvement fund, commissions, and fees, the $490,000 worth of its capital stock deposited with the trustee, which was evidently ½ of that authorized in its organization, was to be surrendered and reissued to the beneficiaries. The ultimate profits of the project, it would thus appear, were to go in some measure to the beneficiaries.

Adopting the terminology of the declaration of trust which named Bayly Bros., Inc., and Edwards & Wildey Company as "beneficiaries," although there were other cestuis que trustent, we find no recognition that any other persons were beneficiaries or had any claim or interest in the proceeds to be

derived under the trust. That is to say, although plaintiff had subscribed and paid for its beneficial interest, as had others, before the declaration of trust was executed, the existence of plaintiff's claim was not recognized in the declaration. The trust did provide, however: "The Beneficiaries herein named, and each of them, shall have the right and privilege of dividing their beneficial interest hereunder and of assigning and transferring portions thereof, subject to all the terms, conditions, obligations and provisions hereof, but no sale or transfer of any interest hereunder shall be valid or binding upon the Trustee until an executed original of such transfer in form satisfactory to the Trustee has been delivered to it, or, if such interest be transferred by decree or order of Court, then only upon the presentation to the Trustee of satisfactory proof of the regularity and validity of such decree or order."

In February, 1926, the plaintiff received the following instrument, executed by Bayly Bros., Inc., and Edwards & Wildey Company:

"February 2, 1926.

"Know All Men By These Presents:

"That for value received Bayly Brothers, Inc., and Edwards & Wildey Company do hereby assign, transfer and set over unto Mary Pickford Company an undivided 25/490 beneficial interest of the Beneficiaries in, to and under that certain Declaration of Trust executed by California Trust Company, of Los Angeles, California, dated December 24, 1925, and bearing its number PT-337, together with a like interest in and to the Beneficiaries' net proceeds and avails arising or growing out of the said Trust; and said Trustee is hereby authorized to pay, turn over and deliver unto said Mary Pickford Company all moneys, stock and benefits accruing out of the said interest hereby assigned, and to consider said assignee Beneficiary under said Trust to the extent of such interest.

"This assignment is made, however, subject to all of the terms and conditions of said Declaration of Trust.

"In Witness Whereof, Bayly Brothers, Inc., and Edwards & Wildey Company have each caused this instrument to be executed by its proper officers thereunto duly authorized."

Addressed to California Trust Company, the plaintiff wrote acknowledging receipt and acceptance of the assignment of beneficial interest to which the trust company replied: "California Trust Company acknowledges receipt of a duplicate of the Assignment above referred to and of this Acceptance this 20th day of May, 1926."

[1] We have no hesitancy in holding that the instrument delivered to the plaintiff was a security within the meaning of the Corporate Securities Act (Stats. 1917, p. 673; Deering's General Laws 1923, Act 3814). As amended in 1925 (St. 1925, p. 962) and effective during the period which is engaging our attention, the statute defined "security" as follows in section 2, subsection 7: "The word 'security' includes: * * * (d) Any instrument offered for sale, or sold, or issued, to the public by any company, evidencing or representing any right to participate or share in the profits, earnings or income, gross or net, derived from the assets, or any thereof, of any business carried on for profit or in the distribution of such assets."

In subsection 3 of section 2 the statute had already defined "company" in this fashion: "3. The word 'company' includes all domestic and foreign private corporations * * * (with certain exceptions not of interest to us)."

[2] The words "to the public" as used in the definition are neither defined in the statute, nor has their scope been judicially limited. In the case of In re Leach (1932) 215 Cal. 536, 12 P.(2d) 3, 7, the difficulty of discerning the dividing line between securities issued to sell to the public and those not, was recognized, but, it was said, the meaning of the words was reasonably plain and free from any serious ambiguity and "Each case must be decided upon its own particular set of facts." In the record before us we find that the evidence supports the trial court's finding that beneficial interests, including that purchased by the plaintiff, "were offered for sale and were issued, sold, transferred and delivered * * * to the public." The evidence to which we refer does not include and it is not necessary that it should include any invitation extended to the general public to buy, either by public advertisement or a house to house canvas. We do find that the officers of Bayly Bros., Inc., solicited subscriptions from their friends. One of them solicited the plaintiff; how the contact was made does not appear, but there is nothing to indicate it was because the plaintiff was one of an exclusive group. One of the reasons why

Edwards & Wildey Company was taken into the project was that they had "a large following of syndicate subscribers, and that when (they) offered them this deal, they would be glad to get it." Edwards & Wildey Company represented that they had had some seventy such syndicate deals and the scheme discussed and adopted for the Sunshine Ranch project was to "form a syndicate according to his usual plan and invite people in." An offering of securities is "to the public" even though the effort to sell be limited to that portion of the public proven by experience to be particularly susceptible to such offers.

A surface similarity exists between the circumstances of this case and those involved in Bernesen v. Fish (1933) 135 Cal.App. 588, 28 P.(2d) 67, and Faires v. Title Ins. & Trust Co. (1936) 15 Cal.App.(2d) 350, 59 P.(2d) 428, which causes the appellants to contend on the authority of those cases, that that which plaintiff purchased was not a security for which a permit was a prerequisite. In the case first cited the plaintiffs were endeavoring to recover money they had paid on the purchase of land of which they had received neither possession nor title. The defendants disavowed liability on the ground that, although possessed of certificates of beneficial interests in the trust which sold the land to the plaintiffs, they (the defendants) were not legally members in the trust because the certificates had been issued to them without a permit. The facts were that two of the defendants, having an option to purchase a large acreage, had formed with some eighty others a syndicate to make the purchase. The conveyance had been taken in the names of those who held the option, and subsequently they had conveyed it to a trust company which executed a declaration of trust in many particulars quite similar to that before us. Before the plaintiffs purchased the land they never acquired, certificates of beneficial interests had been given the defendants. This statement of facts, it was held by the appellate court, failed to reveal the necessity of a permit. For one thing the court pointed out [at page 603 of 135 Cal. App., 28 P.(2d) 67, 74]: "There is no evidence that any beneficial interest was ever offered for sale to the public." Furthermore, property acquired as the result of money contributed by others is held under a resulting trust for those others, whose "position of owners of beneficial interests under the resulting trust would not be changed by the conveyance of the legal title" to a new and express trustee. "Assuming these circumstances to be true, the certificates issued * * * to them created no new interest in the trust estate, but were merely evidences of interests created by operation of law when the resulting trust first came into being. Under such circumstances no permit might be necessary for the issuance of certificates if they were not to be sold or offered for sale."

In Faires v. Title Ins. & Trust Co., supra, 15 Cal.App.(2d) 350, 59 P.(2d) 428, the same conclusion was reached by the same court under circumstances strikingly similar. The plaintiff was a member of a syndicate buying land, which was taken in the name of the defendant trust company. Plaintiff's beneficial interest was acknowledged by the trust company in a declaration of trust executed by it. The resulting trust, following the acceptance of title of land purchased by others, it was held, created the beneficial interests which the declaration of trust recognized. No certificates were issued; none was sold or offered for sale.

[3] The difference between these cases and ours is both apparent and vital. That which plaintiff was offered, as one of the public, and that which it purchased, was not land, nor an interest in land, but a certificate of beneficial interest in a project. No doubt a resulting trust arose in favor of the beneficiaries named in the trust, when, without giving any consideration, the California Trust Company received title to Sunshine Acres, but the certificate of beneficial interest which the plaintiff subsequently received was not simply a new expression of the interest which the plaintiff already had in the real property known as Sunshine Acres, but was the evidence of its interest in the enterprise which had been undertaken to improve, subdivide, and sell that property. One who subscribes to stock in a company about to be formed to deal in land, may know that his money, together with that of others, is going to buy the land and carry on the sales campaign, as was the case in Walker v. Harbor Realty & Development Company (1931) 214 Cal. 46, 3 P.(2d) 557. The fact which he knows does not alter the character of that which he has purchased; it is stock and not land. So with plaintiff. It was a beneficial interest and not land which was offered it and which it intended to and did purchase. Neither Bayly Bros., Inc., nor Edwards & Wildey Company had

a legal right to offer to sell such a beneficial interest to the plaintiff without a permit from the commissioner of corporations.

[4] The suggestion that in determining to grant permits to Suburban Estates, Inc., first that it might issue 5 shares to its incorporators, then authorizing it to deliver the 98,000 shares already referred to, the commissioner of corporations became cognizant of the scheme to sell and issue such certificates as the plaintiff bought and received, and that he must, therefore, be deemed to have approved of the offering and sale, even if true, avails the defendants nothing. At most, it but proves that the commissioner would have issued a permit had applications been made for one. What the terms and conditions of the permit would have been, no one can say. The fact remains that no permit was granted to anybody to do anything respecting the securities in question. We have presented before us, therefore, a violation of the provisions of section 3 of the Corporate Securities Act (St.1917, p. 675), reading: "No company shall sell * * * or offer for sale, negotiate for sale of, or take subscriptions for any security of its own issue until it shall have first applied for and secured from the commissioner a permit authorizing it so to do."

We are thus brought face to face with four questions, each requiring an understanding of the nature of the cause of action upon which the plaintiff has recovered judgment. Is the action barred by the statute of limitations? What should be the measure of damages? From what date should interest be allowed? Against what defendants may the cause be pressed? While "There is in this state but one form of civil actions for the enforcement or protection of private rights and the redress or prevention of private wrongs" (section 307, Code Civ.Proc.), within that single form may be brought many actions with differing periods of limitations (section 335 et seq., Code Civ.Proc.), and with differing measures of damage (sections 3281-3360, Civ.Code), which may include an allowance of interest (sections 3287-3290, Civ.Code).

[5] We have concluded that, so far as the questions presented are concerned, the cause of action established by plaintiff must be considered one for damages for fraud. Persuasive as may be appellants' arguments that some of the elements usually regarded as essential to a fraud action are lacking, and some elements present are inconsistent with the theory that the action is one for fraud, the time comes when an appellate court should, for the orderly administration of justice, consider that previous decisions close the door to further discussion. The door may be considered not only closed to us, but sealed, for the question is one which has been answered by our Supreme Court. In Gillis v. Pan American Western Pet. Co. (1935) 3 Cal.(2d) 249, 44 P.(2d) 311, the question presented was the sufficiency of a second amended complaint in which the plaintiffs sought damages in the sum of $63,357.50, the amount paid for stock issued without a permit. The defendants, directors of the corporation, argued "that the complaint is not grounded in fraud, but upon contract," and further "plaintiffs have pleaded no actionable fraud." The reviewing court summed up the complaint in these words [at page 255 of 3 Cal.(2d), 44 P.(2d) 311, 314]: "In substance, as already observed, the plaintiffs alleged that these respondents ordered the stock to be issued and sold in California; that the defendant corporation had no permit; and that plaintiffs were unaware of this noncompliance with the law when they purchased the stock so ordered to be issued; that plaintiffs relied upon the genuineness of the stock; that all of respondents knowingly aided and assisted in the issuance of the stock; and that the plan of organization was designed by respondents to evade the laws of California." The Supreme Court then observed: "We think respondents misconceive the purpose of these allegations. In Green v. Caribou Oil Min. Co., 179 Cal. 787, 178 P. 950, 952, involving a certificate of stock illegally issued, this court in referring to fraud said: 'It comes from the false issue itself, which is the act of the corporation officers within the apparent scope of their authority, which, in effect, is a representation by the corporation itself to the purchaser from the original holder that the false stock is genuine.' So, here, when respondents valued the stock issued and took all the necessary preliminary steps, and had the corporation issue the stock to appellants, they, in effect, represented that they had complied with the Corporate Securities Act and had obtained a permit without which the stock could not be issued or sold. Such is the effect of Boss v. Silent Drama Syndicate, 82 Cal.App. 109, 255 P. 225, where the court said that the purchaser had the right to rely upon a similar representation. And in MacDonald v. Reich & Lievre, Inc.,

100 Cal.App. 736–742, 281 P. 106, 108, we read: 'When a corporation issues to the public certificates of stock, regular on their face, it amounts substantially to a representation that the certificates are regular and valid. Certificates of stock so issued by a corporation, but which were irregular or void for reasons not participated in by the stockholder, have been held to amount to a misrepresentation and fraud upon the part of the corporation officials for which the corporation is answerable.' (Citing cases.) To the same effect reference may be had to Walker v. Harbor Realty, etc., Corp., 214 Cal. 46, 3 P.(2d) 557; Randall v. California L. B. Syndicate, 217 Cal. 594, 20 P.(2d) 331; Mannion v. Baldwin, 217 Cal. 600, 20 P.(2d) 678, and Holmquist v. Kent, 219 Cal. 231, 25 P.(2d) 977. The allegations of the present case bring it within the rule announced; and we are not called upon to consider an assumed situation where the information of the purchasers is sufficient to remove it from the operations of the rule." The judgment dismissing the action as to the directors was accordingly reversed.

No service would be rendered by our quoting from or discussing other decisions. That one who has been sold a security contrary to the Corporate Securities Act may recover the amount paid as damages for fraud, is recognized by the cases cited in Gillis v. Pan American Western Pet. Co., supra, 3 Cal.(2d) 249, 44 P.(2d) 311, and also in McClory v. Dodge (1931) 117 Cal.App. 148, 4 P.(2d) 223; O'Connell v. Union Drilling, etc., Co. (1932) 121 Cal. App. 302, 8 P.(2d) 867. In these two cases, it is true, mention was also made of the right of recovery on the theory of money had and received, but recovery was allowed, in the case last cited, against those who had participated in, but had not become unjustly enriched by the transaction, a result only possible in the tort action of fraud, not in an action for money had and received. Pollak v. Staunton (1930) 210 Cal. 656, 665, 293 P. 26; and see Randall v. California L. B. Syndicate (1933) 217 Cal. 594, 599, 20 P.(2d) 331.

[6] It is not essential to make out a case of fraud, under the facts of a case such as ours, that it should appear that those whose duty it is to secure a permit should apprehend the necessity of having a permit. The ignorance of those responsible of the fact that a permit is lacking does not relieve them from liability. People v. McCalla (1923) 63 Cal.App. 783, 220 P. 436; Boss v. Silent Drama Syndicate (1927) 82 Cal.App. 109, 255 P. 225; El Claro Oil, etc., Co. v. Daugherty (1936) 11 Cal.App.(2d) 274, 286, 53 P.(2d) 1028, 55 P.(2d) 488

With respect to the plea that the action was barred by the statute of limitations, therefore, we find that the provision which controls is found in subsection 4 of section 338 of the Code of Civil Procedure, prescribing three years as the period within which may be commenced. "4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.' Castle v. Acme Ice Cream Co. (1929) 101 Cal.App. 94, 281 P. 396; Klombies v. Weeks Poultry Community (1932) 121 Cal.App 175, 8 P (2d) 940 Indeed, there is authority that the statute of limitations would be the same had the form of the action been for money had and received. MacDonald v. Reich & Lievre, Inc. (1929) 100 Cal.App. 736, 281 P. 106.

[7] The further argument is made by appellants that even though the statute of limitations be that which we have stated it is, that the lack of a permit was a matter which could have been easily ascertained, and that it must, therefore, be deemed to have been discovered more than three years before the commencement of this action. It is impossible to reconcile all that has been said in the many cases upon this question. We feel justified in relying upon the provisions of the Code section itself (section 338, supra) read in the light of section 19 of the Civil Code, which provides: "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact." The principle that diligence in making the discovery must be shown, which is applied with varying degrees of strictness throughout the cases, is "but the declaration of the equitable rule enunciated in section 19 of the Civil Code," according to Lillis v. Silver Creek, etc., Water Co. (1913) 21 Cal.App. 234, 131 P. 344, 347. In Prewitt v. Sunnymead Orchard Co. (1922) 189 Cal. 723, 209 P. 995, 998, the court referring to this section, quoted from the earlier case of Tarke v. Bingham (1898) 123 Cal. 163, 166, 55 P. 759, where it had been stated: "'But the converse of the proposition is equally true. Where no duty is imposed by law upon a person to make

inquiry, and where under the circumstances "a prudent man" would not be put upon inquiry, the mere fact that means of knowledge are open to a plaintiff, and he has not availed himself of them, does not debar him from relief when thereafter he shall make actual discovery. The circumstances must be such that the inquiry becomes a duty, and the failure to make it a negligent omission.'" This quotation from Victor Oil Co. v. Drum (1920) 184 Cal. 226, 193 P. 243, appears in Denson v. Pressey (1936) 13 Cal.App.(2d) 472, 478, 57 P.(2d) 522, 526: "It is only where the party defrauded should plainly have discovered the fraud except for his own inexcusable inattention that he will be charged with a discovery in advance of actual knowledge on his part."

[8] The evidence in the record before us warranted the trial court in concluding that the plaintiff did not discover the lack of a permit until in January, 1932, nor was it shown to have been possessed of any information which should have aroused its suspicion An investigation conducted by others when an assessment was threatened led to the discovery, reported to the plaintiff, that no permit had ever been given. But the presumption was that the law had been obeyed and any necessary permit obtained; there was no duty on the part of the plaintiff to make inquiry. Hemmeon v. Amalgamated C. Mines Co. (1928) 95 Cal. App. 400, 273 P. 74; MacDonald v. Reich & Lievre, Inc., supra, 100 Cal.App. 736, 740, 281 P. 106. As we start with the premise that this is an action based on fraud, we conclude that it was commenced in time.

[9] With respect to the damages allowed, appellants argue that if the plaintiff's theory of the case is adopted and this be considered an action for damages resulting from fraud, then it follows that the measure of damages should have been the difference between the value of the certificate as it proved to be and the value it would have had if it had been as represented, that is, validly issued. Pressing their advantage on this principle they argue that in view of such cases as Domestic and Foreign Pet. Co., Ltd. v. Long (1935) 4 Cal.(2d) 547, 51 P.(2d) 73, it can no longer be held that the Corporate Securities Act meant what it said in section 12. St. 1917, p. 679. "Every security issued by any company, without a permit * * * shall be void," but that a security issued without a permit is voidable, only, and as such has a real market value. It may be that our statement in Black v. Solano Co. (1931) 114 Cal.App. 170, 299 P. 843, that the eyes of the law see a security issued without a requisite permit as a blank piece of paper, will have to be modified to read that the law sees it as a piece of paper blank on one side only. Nevertheless, it may not be doubted that when the blank side is presented by the purchaser in such actions as this, only the blank side is visible. Without attempting to reconcile the cases, if reconciliation be necessary, our conclusion is that for the purposes of measuring damages, the invalidly issued security is deemed valueless. In Boss v. Silent Drama Syndicate, supra, 82 Cal.App. 109, 255 P. 225, Walker v. Harbor Realty, etc., Co., supra, 214 Cal. 46, 3 P.(2d) 557, and O'Connell v. Union Drilling, etc., Co., supra, 121 Cal. App. 302, 8 P.(2d) 867, judgments were rendered for the full amounts paid for the "void" securities, and such a result seems forecast in Gillis v. Pan American Western Pet. Co., supra, 3 Cal.(2d) 249, 44 P.(2d) 311.

[10] The rule expressing the measure of damages upon which the appellants rely is subject to this exception: "One who has, by fraud, been induced to part with property, receiving nothing in return, must be entitled to recover at least the value of what he has thus given. He is certainly damaged to the extent of the consideration thus obtained from him," as was stated by the Supreme Court in denying a hearing in George Cople Co. v. Hindes (1917) 34 Cal.App. 576, 170 P. 155, 156. We conclude that the plaintiff, having paid $25,000 for a certificate of beneficial interest which it has shown to be void and hence valueless, was entitled to judgment for damages in the principal sum of $25,000.

[11, 12] Damages by way of interest were allowed, not from the dates in 1925 when the two payments were made which totaled $25,000, but from January 7, 1933, when the plaintiff made demand upon the California Bank & California Trust Company for the return of the $25,000 it had paid. The plaintiff contends that it was entitled to interest from the dates of payment, relying upon the provision of section 3287 of the Civil Code which was applied in Boss v. Silent Drama Syndicate, supra, 82 Cal. App. 109, 115, 255 P. 225: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon

from that day." Section 3288 of the Civil Code gives us a clearer understanding of the scope of the preceding section than can be had from reading that section alone. It is apparent to us that the two sections intend to cover separate, not overlapping, fields. Section 3288 provides: "In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury." If citation of authority is necessary, we find the allowance of interest justified under this section in two fraud actions, tried without juries: Desmond v. Standard Bond & Mtg. Co. (1928) 91 Cal.App. 201, 266 P. 1005, and Isaacs v. Frank Meline Co. (1934) 2 Cal.App.(2d) 341, 37 P.(2d) 1045. Because, in a case such as this, the allowance of interest is by the code confined to the discretion of the trier of facts without direction as to when it should begin, if allowed, it is our opinion that the determination of the day from which the interest shall date is also left to the court's discretion. In the case before us we find no abuse of that discretion.

[13] From what has been said up to this point, it is apparent that the judgment against the two corporations, Bayly Bros., Inc., and Edwards & Wildey Company, must be affirmed. In stating this conclusion, we are not unmindful of the argument persuasively presented that trust companies were authorized to sell and issue securities without a permit at the time of the events giving rise to our problems. The fault we find with this argument is that it is not appropriate to the facts of this case; the California Trust Company had not been approached to act as trustee when the first payment was made by the plaintiff; it did not sell or issue the security involved in this case. We are not at this moment considering the argument of the plaintiff that the judgment against the trust company must be affirmed because it was a joint tort feasor with the two corporations in their fraud. The position we are stating is that the two corporations are not to escape liability because the security which they sold and issued was a security of the trust company. The subscription was sold before the California Trust Company was a party to the project; the declaration of trust did not recognize the plaintiff or the present existence of its rights; the certificate was issued by the two corporations, not by the California Trust Company.

We find no word spoken particularly on behalf of the defendant Suburban Estates, Inc., so we presume that there is no question but that it was so implicated with the two corporations, Bayly Bros., Inc., and Edwards & Wildey Company, whose instrument it appears to have been, that an affirmance of the judgment against them requires like action respecting the judgment against it. The judgments against the individuals, Bayly brothers, and against the California Trust Company are not to be affirmed by default, however; denial is made that the evidence justifies a judgment against any one of the three. To which the plaintiff responds that all three participated in the fraud committed by the two companies and are equally responsible in damages.

The position taken by the plaintiff is grounded upon several decisions. Boss v. Silent Drama Syndicate, supra, 82 Cal. App. 109, 255 P. 225, 226, dealt with "an unincorporated association operating by virtue of a trust agreement under which defendants Graydon and Brown were its trustees." Without discussing the nature of the participation of Graydon and Brown, the judgment against them was affirmed, the opinion touching on their liability reading (at page 111 of 82 Cal.App., 255 P. 225, 226): "While, as suggested by appellants, much authority is available to the point that in an action for deceit, intentional fraud, rather than constructive fraud, is a necessary element to the maintenance of an action, nevertheless, with reference to the act by a corporation acting in excess of its powers in issuing certificates of stock, it appears to be well-established law that not only the corporation, but as well its officers so issuing such stock, are legally responsible therefor to purchasers in good faith, even though the act by the corporation be done through mistake and without any fraudulent intent."

Five gross overriding royalty interests of one per cent were illegally sold by a corporation for $4,000. A judgment against the five directors of the corporation was sustained in O'Connell v. Union Drilling, etc., Co., supra, 121 Cal.App. 302, at page 308, 8 P.(2d) 867, 870, the court declaring: "As to officers of a corporation, it has been held generally that they do not incur liability simply by reason of their official character, but that if they commit a tort they are liable therefor; and it matters not what liability may attach to the corporation for the tort. * * * The

authorities are uniform in holding nonparticipants immune from liability, but the directors herein named who were respectively president and secretary of the appellant corporation are shown to have actively participated in the issuance of securities which were void from their inception."

The significance of Randall v. California L. B. Syndicate, supra, 217 Cal. 594, at page 599, 20 P.(2d) 331, 333, may be gained from this quotation: "* * * the evidence supports the findings that the defendants Fletcher and Haskell had notice and knowledge that the certificates issued to the plaintiffs were so issued in exchange for real property and with their aid and assistance. The evidence on this phase of the case is that the proposition to exchange the real property for stock was placed before said defendants as directors and the direction for the consummation of the transaction was voted by them. Participation on their part in the issuance of the stock amounts in law to a representation that such stock is valid and genuine, upon which the plaintiffs relied to their damage."

In Mannion v. Baldwin, supra, 217 Cal. 600, 20 P.(2d) 678, the plaintiff was denied recovery of $7,500 paid for stock which had been issued not for cash as the permit authorized. In reversing the judgment our Supreme Court opined (at page 604 of 217 Cal., 20 P.(2d) 678, 680) "Defendants Baldwin and his wife and Gladys Sykes were all directors who were present at the meeting which voted to issue the stock in violation of the permit. They are active participants, and equally liable. O'Connell et ux. v. Union Drilling & Petroleum Co. et al. [121 Cal.App. 302] 8 P.(2d) 867. It is true that they did not actually participate in the sale to plaintiff, but the uncontradicted evidence shows that at the meeting of December 1st, when the stock was issued, the directors knew that it was going to Mrs. Mannion. * * * It does not appear that defendant Sherman M. Sykes was in any manner connected with the issuing of the stock, and he therefore cannot be compelled to reimburse plaintiff."

We do not have the details of the part played by the defendant directors in the illegal sale of stock in Holmquist v. Kent, supra, 219 Cal. 231, 234, 25 P.(2d) 977, 978, but a judgment against the two directors, who were also the vice president and secretary of the corporation, was affirmed because, "If the transaction involved in the present case was a violation of the permit, then the manner of its consummation and the acts of the agent Stewart to that end were, under the facts disclosed by the record, attributable to the defendants Fletcher and Haskell."

In Walker v. Harbor Realty, etc., Corp. (1931) 214 Cal. 46, 3 P.(2d) 557, 558, a judgment against the president of the defendant corporation was affirmed. As to the other individual defendants the judgment was reversed, the opinion reading [at page 49 of 214 Cal., 3 P.(2d) 557]: "There is, however, no evidence in the record to connect the defendants * * * with the false and fraudulent representation made to the plaintiff." As the opinion itself does not contain any further reference to the record evidence and the original record cannot be located in the clerk's office, we are not able to evaluate this decision. If the evidence did indicate the active co-operation of all the defendants, as would appear from the briefs in the case, then the case would appear to be out of harmony with those decided both before and after its appearance.

[14] Measured by the cases, the judgment against the two personal defendants, Harold and Roy D. Bayly, must be affirmed. If there is any injustice in this conclusion, it flows from the premise that the sale and issuance of the certificate of interest without a permit constituted fraud, even though the necessity for a permit was unappreciated, for there is no injustice in holding that those who knowingly participate in the furtherance of a fraud are liable for its consequences. The evidence warranted the trial judge in concluding that, while one Dunham, a vice president of Bayly Bros., Inc., was the one who actually secured the plaintiff's subscription, his activity in this regard, was but a part of the scheme for securing subscriptions which was known to and approved by Harold Bayly, the president, and Roy D. Bayly, another vice president, of Bayly Bros., Inc., and his activity was in the discharge of the responsibility which had been placed upon and left to him by them. In addition to other evidence, we find this question and answer while vice president Dunham was a witness: "Who determined or decided upon the mechanics that were to be used in forming this syndicate and raising the money? A. I would say the executives of Bayly Brothers and of Edwards & Wildey." The two individual defendants were two of the three executives known to us. Had they determined and decided upon a scheme whereby in-

terests were to be sold on the false representation that Sunshine Ranch was so called because gold was present in great quantities on it, their responsibility for consequent damages in a particular case could not be escaped by the plea that Dunham and not they carried the scheme through to a successful conclusion. In our case, the fraud consisted in selling certificates of interest without a permit, the campaign in which this was done being one known to and approved by the two Baylys, in part actively participated in by them. As we have seen, their ignorance of the fact that a permit was needed or was lacking was no defense. The judgment against them must be affirmed.

Quite generally in its findings the trial court included the California Trust Company as one of the defendants which, it determined, sold the certificates to the public and offered them to the plaintiff, and so forth. All the findings of its participation and activities, however, are qualified by this further provision: "Whenever and wherever in these findings reference is made, to any act or acts of the defendants, it is intended to find and such findings will be construed to mean, that so far as California Trust Company is concerned, its acts, either alone or participated in with other defendants, were those in which it assumed, entered upon and carried out its duties and obligations as trustee under said declaration of trust; provided, however, that this finding does not have reference to any of the acts of California Trust Company as escrow holder. * * *" As we understand the plaintiff's position and as we view the case, there is no claim nor basis for a claim that the activities of the defendant trust company as escrow holder furnish any basis for the judgment against it. The basis urged is that the "California Trust Company actively participated in, aided, abetted, and assisted in their issuance and sale."

[15, 16] We are of the opinion that the California Trust Company was not shown to be a joint tort-feasor with those who illegally sold and issued a certificate of interest to the plaintiff. We have reached our conclusion in spite of the fact that it does appear that the trust company prepared and had printed the forms used by the other two defendant corporations to evidence the interests the various subscribers had purchased, and knew that the forms were to be used for that purpose. In other ways, the trustee co-operated with its two codefendant corporations in carrying out the project in which it was playing the role first of escrow holder, then of trustee. It did take care to see that its record of the assignments of beneficial interests was correctly kept.

In none of these activities, though, did it fail in any duty that it owed to the plaintiff. To begin with, as heretofore noted, the sale was made to the plaintiff before the defendant trust company had any part in the enterprise. At no time was it contemplated or agreed that it would issue a certificate to the plaintiff; that was to be done, as it was done, by the two corporations. It follows, it seems to us, that the defendant trust company had no more duty to know that a permit had not been applied for than it had to apply for it, and had no more duty to decline to co-operate with the two corporations in their issuance of the certificates than the printer had to decline to print them. The officers of a corporation in charge of its campaign to sell securities are bound at their peril to know that a permit is needed; that duty is not imposed on all who may have a connection with the transaction, but no part in the sale or issuance of the security. Support for this conclusion we find in the concluding paragraph in Faires v. Title Insurance & Trust Co., supra, 15 Cal.App (2d) 350, 356, 59 P.(2d) 428.

A rereading of the briefs discloses no point which does not appear either to have been covered explicitly or implicitly in what we have written, or not to be worthy of comment extending this opinion further.

The judgment as to California Trust Company is reversed. The judgment as to the other defendants is affirmed. The orders appealed from are affirmed.

I concur: HOUSER, P. J.

DORAN, Justice.

I concur. With respect to interest, it was properly allowed as of the demand date, January 7, 1933, not only for the reasons given above but as well upon the authority of the following cases: Knight v. Bentel, 39 Cal.App. 502, 510, 511, 179 P. 406; Hayt v. Bentel, 164 Cal. 680, 686, 130 P. 432; McDevitt v. Butte City Ranch, 7 Cal.App.(2d) 252, 256, 46 P.(2d) 290; Shirreffs v. Alta Canyada Corp., 8 Cal.App. (2d) 742, 756, 48 P.(2d) 55; Wilson v. Rigali & Veselich, 138 Cal.App. 760, 768, 33 P.(2d) 455.

Mabel P. BARTLETT, Plaintiff, Appellant and Respondent, v. SUBURBAN ESTATES, Inc. (a Corporation), Bayly Brothers, Inc. (a Corporation), Harold Bayly, Roy D. Bayly, Edwards & Wildey Company (a Corporation), and Walter C. Durst, Trustee in Bankruptcy of Edwards & Wildey Company, Bankrupt; and California Trust Company (a Corporation), Defendants, Respondents and Appellants; California Bank (a Corporation), Defendant. *

J. L. HICKSON and Hannah A. Hickson, Plaintiffs, Appellants and Respondents, v. SUBURBAN ESTATES, Inc., et al., Defendants, Respondents and Appellants.

B. A. FINCH, Plaintiff, Appellant and Respondent, v. SAME.

Reese LLEWELLYN, Plaintiff, Appellant and Respondent, v. SAME.

Lida WEBBER, Plaintiff, Appellant and Respondent, v. SAME.

J. H. WATT, Plaintiff, Appellant and Respondent, v. SAME.

George W. PIERSON and Gertrude Wilson, Plaintiffs, Appellants and Respondents, v. SAME.

James SHALDA and Mary Shalda, Plaintiffs, Appellants and Respondents, v. SAME.

O. G. BATES, Plaintiff, Appellant and Respondent, v. SAME.

Civ. 11139–11147.

District Court of Appeal, Second District, Division 1, California.

April 30, 1937.

Rehearing Denied May 29, 1937.

Hearing Granted by Supreme Court June 28, 1937.

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

A. W. Sorenson, B. A. Finch, G. C. DeGarmo, and W. M. Crane, all of Los Angeles, for plaintiffs, appellants and respondents.

Swanwick, Donnelly & Proudfit and Finlayson, Bennett & Morrow, all of Los Angeles, for plaintiffs, appellants and respondents California Trust Co.

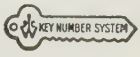
Chapman & Chapman, Joseph K. Horton, and John S. Frazer, all of Los Angeles, for plaintiffs, appellants and respondents Bayly Bros., Harold Bayly, Roy D. Bayly, Suburban Estates, Inc., and Edwards & Wildey Co.

BISHOP, Justice pro tem.

The opinion in the case of Mary Pickford Company v. Bayly Brothers, Inc., 68 P.(2d) 239, this day filed by us, contains our reasons for the judgments we are entering in the above-entitled cases. These and the Mary Pickford Company Case were all tried together and were presented to us on one reporter's transcript. There is no difference, affecting the result, between the findings of fact in the case already disposed of and the findings in these cases. Judgments were rendered against the same defendants in these cases as in the other, and each appealed. The defendants Harold and Roy D. Bayly also appealed from the order in each case denying their motions to vacate the judgment and enter one favorable to them. No such motion was made by the respective plaintiffs, who have appealed from the judgment in that it denies them all the interest they sought.

The judgment in each case, above entitled, in so far as it affects the California Trust Company is reversed; otherwise it is affirmed. The order appealed from in each case is affirmed.

We concur: HOUSER, P. J.; DORAN, J.



LeSAGE v. TITLE GUARANTEE & TRUST CO. et al. †

Civ. 10646.

District Court of Appeal, Second District, Division 1, California.

May 6, 1937.

Rehearing Granted June 4, 1937.

1. Licenses ⇐18½

Where trust was created under which trust company was trustee and corporations and individuals were trustors and beneficiaries, and notes were issued, by executive committee appointed by all parties to trust, to buyers of beneficial interests in trust, beneficial interests *held* "securities," the sale of which without permit was fraudulent, under statute (St.1917, p. 673, as amended).

[Ed. Note.—For other definitions of "Security," see Words & Phrases.]

*For subsequent opinion see 86 P.2d 117.

† For subsequent opinion see 86 P.2d 115.

2. Licenses ⇐39

Amended complaint of assignee of buyers of beneficial interests in trust, alleging that trust was created under which trust company was trustee and corporations and individuals were trustors and beneficiaries, that all such parties participated in issuance and sales without permit of beneficial interests whereby notes were issued to buyers to evidence beneficial interests, and that trust company received payments for such interests *held* to state cause of action against trust company for fraud (St.1917, p. 673, as amended).

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by M. M. LeSage against the Title Guarantee & Trust Company and others. From an adverse order and an adverse judgment, plaintiff appeals, opposed by named defendant.

Judgment reversed, and appeal from order dismissed.

Claude I. Parker, Ralph W. Smith, G. C. DeGarmo, and W. M. Crane, all of Los Angeles, for appellant.

Laurence W. Beilenson, of Los Angeles, for respondent.

Mott, Vallee & Grant, of Los Angeles, amici curiae.

BISHOP, Justice pro tem.

Should we consider and determine that the only respondent, Title Guarantee & Trust Company, a trust company for some purposes, an insurance company for others, would not have needed a permit to be able legally to issue the securities involved in this action, it would still leave causes of action stated against the respondent in the amended complaint which require us to reverse the judgment. We find it futile, therefore, to consider the proposition so ably presented, that the respondent did not need a permit to issue securities.

The judgment from which plaintiff's appeal is taken is one dismissing the causes of action numbered 1 to 43, inclusive, in the amended complaint, to which a demurrer had been sustained without leave to amend. The judgment disposing of the forty-fourth cause of action is not involved in this appeal. The forty-three causes of action represent as many purchases of beneficial interests in a trust established by the defendants as a means of financing and carrying on a project to improve and sell a real estate subdivision.

The amended complaint tells us that the defendants, other than respondent, furnished the consideration to some third parties for the conveyance of real estate to the respondent, who received it in trust. All the defendants executed a declaration of trust in which the respondent was named as trustee, the other defendants were recognized as beneficiaries. At the time the trust was created, the defendants, including the respondent, agreed and planned among themselves to offer, issue, and sell to the public beneficial interests to the extent of $300,000. For the purpose of facilitating the sale and issuance of these beneficial interests to the public, the defendants, not excluding the respondent, appointed and empowered five of their number as an executive committee to execute to each purchaser as evidence of his beneficial interest, a promissory note. The forty-three notes attached to the amended complaint as exhibits appear to have been executed by a majority or more of the executive committee, and recite that they promised, as an executive committee of the beneficiaries and not as individuals, to pay the amount of the note with interest, and that "an assignment of the beneficial interest" in the trust secured the payment. There is nothing on the face of the notes to indicate any liability or participation on the part of the respondent. The amended complaint further declares: "That from 1925 to 1930 all of the defendants in this action offered, issued and sold, or aided and participated in the offer, issuance and sale to the public including plaintiff's assignors herein, beneficial interests in said trust and all payments therefor were, according to an understanding between the defendants, made to and received by defendant Title Guarantee & Trust Company under said trust, and said executive committee for and on behalf and with the approval of all of the defendants executed to the respective purchasers of said beneficial interests its promissory notes hereinafter mentioned as evidence of said payment and the purchase of and interests as hereinafter related."

No permit for the issuance or sale to any party of any right in the trust or its earnings had ever been granted by the commissioner of corporations.

[1, 2] In this case, as in Mary Pickford Company v. Bayly Brothers, Inc., 68 P. (2d) 239 (recently filed by us), it appears

that the beneficial interests involved were securities which it was a fraud to sell contrary to the provisions of the Corporate Securities Act (Stats.1917, p. 673, as amended, Act 3814, Deering's General Laws 1923). In this case, as in the Pickford Case, the securities do not seem to have been the issue of the trustee, hence any power to act without a permit which it may have is not involved. But in this case we have that which we found lacking in the Pickford Case, the fact of the active co-operation and participation in the sale and issuance of the invalid securities on the part of the trustee.

We have concluded that the amended complaint, in its forty-three causes of action, alleges sufficient facts to reveal the respondent as a joint tort-feasor with the other defendants in the sale and issuance of securities which some of the other defendants were to and did issue, although they lacked the permit the law required of them. The demurrer to these causes of action should not have been sustained. Mary Pickford Company v. Bayly Brothers, Inc., supra.

The judgment is reversed. The appeal from the order sustaining defendant's demurrer is dismissed.

We concur: YORK, Acting P. J.; DORAN, J.

KEY NUMBER SYSTEM

OAKS et ux. v. KENDALL et al.*

ERWIN v. SAME.

Civ. 5589.

District Court of Appeal, Third District, California.

April 27, 1937.

Rehearing Granted May 27, 1937.

1. Judgment ⇐780(3)

Purchaser's mere equitable interest in realty under conditional sale contract is not such ownership as will subject it to lien of judgment held by stranger to contract against purchaser (Code Civ.Proc. § 674).

2. Vendor and purchaser ⇐260(2)

Vendor's lien on realty to secure payment of unpaid portion of purchase price thereof was prior and superior to lien subsequently acquired by vendee's judgment creditor (Civ.Code, § 3046; Code Civ.Proc. § 674).

3. Vendor and purchaser ⇐260(2), 265(2)

Vendor's lien for unpaid balance of purchase price of realty is superior to rights of all persons except bona fide purchasers for valuable consideration without notice and takes precedence over all claims and liens of judgment and attachment creditors of purchaser (Civ.Code, § 3046; Code Civ. Proc. § 674).

Appeal from Superior Court, Shasta County; Albert F. Ross, Judge.

Suit by G. E. Oaks and wife against Thomas R. Kendall, Evelyn Erwin, and others, in which the last-named defendant filed a cross-complaint against defendant Kendall and plaintiffs. From a judgment quieting plaintiffs' title to realty, subject to the lien of cross-complainant's judgment against defendant Kendall, plaintiffs appeal.

Reversed, with direction.

L. C. Smith, of Redding, for appellants.

Carr & Kennedy, of Redding, for respondent.

PER CURIAM.

The plaintiffs have appealed from a judgment which was rendered in their favor in a suit to quiet title to real property. The decree quieted title in plaintiffs subject to a lien thereon to secure the payment of a former judgment which was rendered in another suit in favor of Evelyn Brown Erwin, who is a codefendant and cross-complainant in this action. It is contended the court erred in quieting title to the real property *subject to the lien* to secure the payment of the former judgment for the reason that the judgment debtor in the former action held only an equitable title to the property under a conditional sales contract to purchase the land, which equitable interest under the provisions of section 674 of the Code of Civil Procedure is not subject to a judgment lien.

This is a suit to quiet title to certain real property in Shasta county which was previously sold on an executory contract to Thomas R. Kendall and wife. Evelyn Erwin, formerly Evelyn Brown, who is a par-

*For subsequent opinion see 73 P.2d 1255.

ty defendant, filed an answer to the complaint denying the material allegations thereof. She also filed a cross-complaint setting up the judgment of $853 which she secured against Thomas R. Kendall and claiming a lien upon the real property which is involved in this suit to secure the payment of her judgment. Mr. and Mrs. Kendall failed to appear or answer in this action and their default was duly entered. Upon trial of this cause the judgment and proceedings in the ejectment suit between Oaks and Kendall, and the judgment in the suit between Evelyn Brown Erwin and Kendall were received in evidence. The court adopted findings to the effect that plaintiffs are the owners and entitled to possession of the real property as against Mr. and Mrs. Kendall, subject, however, to a lien thereon to secure the payment of the former judgment against Kendall and in favor of the cross-complainant Evelyn Brown Erwin, in the sum of $853 and interest thereon at the rate of 7 per cent. per annum from March 28, 1930. Judgment was accordingly rendered quieting title to the property in plaintiffs, "subject, however, to the lien of the judgment recovered by the defendant Evelyn Erwin against the defendant Thomas R. Kendall in the action entitled 'Evelyn Brown, plaintiff, vs. Thomas R. Kendall, et al., defendants' numbered 7553, in the files of this court, which lien is hereinafter described and decreed."

It is asserted the findings and judgment are not supported by the evidence, since it appears without conflict that plaintiffs are the owners of the land in question and that Thomas R. Kendall and wife merely held a conditional contract to purchase the land which they forfeited for nonpayment of the agreed purchase price thereof, and that they held a mere equitable title which is not subject to lien under the California statute.

The evidence is uncontradicted. The plaintiffs are the owners of the land in question. July 19, 1923, they executed an agreement to sell a portion of the land to the defendants, Thomas R. Kendall and wife upon specified terms and conditions. The title to the land never passed to the purchasers thereof, but pursuant to the conditional contract of sale, the Kendalls took and retained possession of the property. The Kendalls were in default with respect to certain payments under the contract, and these plaintiffs previously brought a suit of ejectment against them. The Kendalls appeared in that suit and denied the allegations of the complaint, and also filed a cross-complaint therein, claiming damages against the vendors for trespass in a specified sum and praying that the plaintiffs be required to execute and deliver to them a deed of conveyance to the property subject to the payment of the balance of the purchase price of the land. The court found that the Kendalls were entitled to damages in the sum of $1,625, and that the unpaid balance of the purchase price of the land then amounted to the sum of $1,506.33. Judgment was thereupon rendered in that suit denying plaintiffs' prayer for ejectment and directing that they execute and deliver to the Kendalls a good and sufficient deed of conveyance to the real property subject to payment of the balance of the purchase price thereof. No appeal was taken from that judgment and it became final. A deed of conveyance of the property was executed and tendered, but the balance of the purchase price was not paid, and the title to the property never passed to the Kendalls.

In March, 1930, the defendant in this suit, Evelyn Brown, now Evelyn Erwin, recovered judgment in another suit against Thomas R. Kendall for the sum of $853. These plaintiffs were not parties to that action. It was brought to recover the value of an automobile which Evelyn Brown earned pursuant to an agreement with Kendall, as a prize for securing the largest subscription list to a Redding newspaper which he then owned and operated. That judgment also became final. An abstract of that judgment was recorded under section 674 of the Code of Civil Procedure. It is contended the judgment in that suit vested a lien in favor of Evelyn Erwin upon the equitable interest in the land which was then held by Kendall and his wife under the conditional contract to purchase the land. Execution was issued in that case and returned unsatisfied. There was no effort to sell the equitable interest in the land to satisfy the judgment.

[1] The findings and judgment in this case to the effect that the respondent Evelyn Brown Erwin, is entitled to a lien upon the land which is involved in this suit to secure the payment of a judgment which she formerly recovered against Thomas R. Kendall, and quieting title to the land in plaintiffs subject to that lien, is not supported by the evidence. That judgment is clearly contrary to law. The mere equitable interest

in real property which is acquired under a conditional sales contract to purchase land, is not such ownership of real property contemplated by the provisions of section 674 of the Code of Civil Procedure, as will vest a lien thereon to secure the payment of a judgment held by a stranger to the contract. Belieu v. Power, 54 Cal.App. 244, 201 P. 620, 621; Poindexter v. Los Angeles Stone Co., 60 Cal.App. 686, 214 P. 241; People v. Irwin, 14 Cal. 428; 34 C.J. 593, § 909; 2 Freeman on Judgments (5th Ed.) 1970, § 937; 3 Tiffany on Real Property (2d Ed.) 2782, § 670.

It is true that specific statutes in some other jurisdictions provide that judgment liens may attach to both legal and equitable titles to real property. Section 674, formerly 671, of the Code of Civil Procedure, which provides that, "An abstract of the judgment or decree of any court of record of this state, * * * may be filed with the recorder of any county and from such filing the judgment or decree becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in such county, owned by him at the time, or which he may afterwards and before the lien expires, acquire," has been repeatedly construed to limit the vesting of such lien to legal titles to real property to the exclusion of equitable interests therein. In 3 Tiffany on Real Property, supra, it is said: "The equitable interest of the vendee of land who has not yet received a conveyance is obviously not subject to the lien in those states in which no equitable interests are so subject."

In 2 Freeman on Judgments, supra, it is said in that regard: "At common law a judgment lien did not attach to a mere equity, though the equity was accompanied by possession. This rule of the common law prevails in several of the United States, and is generally applied, in the absence of any statute undoubtedly creating a different rule. Thus though a statute provided that a judgment should 'be a lien on all real property of the judgment debtor, not exempt from execution, owned by him in the county at the time of docketing', it was held not to make a judgment a lien on the equitable title of the defendant."

In accordance with the rule last announced, the Belieu Case, supra, in which a hearing by the Supreme Court was denied, specifically determined that a judgment does not attach to the equitable interest in real property acquired by a vendee under a contract to purchase the land, where a part of the purchase price, only, has been paid. It is there said: "While many classes of property may be taken on execution, only two classes are subject to the lien of a judgment—real property owned by the debtor at the time of docketing and real property that he may afterwards acquire. While any interest in real property, legal or equitable, may be seized and sold under execution, only real property actually owned by the judgment debtor will support a judgment lien. That a mere equitable interest in real property acquired under a contract of purchase and sale is not such ownership as is contemplated by section 671 [now 674] was clearly decided in the early history of the state."

[2] Moreover, the plaintiffs held a vendor's lien on the real property to secure the payment to them of the unpaid portion of the purchase price of the land (section 3046, Civ.Code; 25 Cal.Jur. 739, §§ 208 and 209), which was prior and superior to any subsequent lien which might be acquired by a judgment creditor of the vendee of the property. 66 C. J. 1245, § 1130; 27 R.C.L. 477, § 192. In 66 Corpus Juris, supra, it is said: "The vendor's lien is superior to the rights of all persons, except bona fide purchasers for a valuable consideration without notice, * * * It takes precedence over claims * * * and liens of judgment and attachment creditors of the purchaser, and purchasers at execution sale."

In 27 Ruling Case Law, supra, it is said: "The judgment or execution lien extends only to the interest of the purchaser and is inferior to the claim of the vendor for the purchase money, and likewise the purchaser at the execution sale will take subject to the rights of the vendor."

It follows that Evelyn Erwin, the judgment creditor of Kendall, could acquire no lien on the property in question which could defeat the plaintiffs' prior right to their vendor's lien to secure the fulfillment of their contract with respect to the sale of the real property, and that the court therefore erred in quieting title to the property in plaintiffs, subject to the payment of her judgment.

The briefs on appeal contain much controversy over the question as to whether the trial court has correctly construed the provisions of the judgment in the former ejectment case of Oaks v. Kendall. The decree

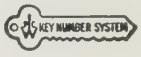
in this case does provide that: "The judgment for the sum of $1625.00 awarded to the defendant, Thomas R. Kendall against the plaintiff, G. E. Oaks by the judgment in the action entitled 'G. E. Oaks, plaintiff, vs. Thomas R. Kendall, defendant,' numbered 7641, was a separable judgment on a cause of action for tort * * *. That the cross-plaintiff Evelyn Erwin is entitled to have her said judgment against Thomas R. Kendall in the amount of $853.00 and accrued interest, as aforesaid, paid and satisfied by said cross-defendant G. E. Oaks out of said sum of $1625.00 awarded to said cross-defendant Thomas R. Kendall by the Judgment in said action."

The judgment in the ejectment case did provide: "That plaintiff take nothing by his Complaint in said action; that defendant do have and recover judgment for damages against plaintiff in the sum of $1625.00" and that "upon the delivery of said deed to defendant, the defendant pay to plaintiff the sum of $1506.33 to cover the balance due plaintiff on the purchase price of said real property."

It does appear that the court determined in the ejectment suit that there was an unpaid balance of $3,131.33 due on the purchase price of the property, upon which Kendall was entitled to a credit of $1,625 on account of damages, leaving a balance of $1,506.33 due to the vendor on the purchase price of the land. In view of what has been said regarding the invalidity of a subsequent judgment lien, it is not necessary for us to determine whether the court properly construed the judgment in the ejectment suit. Regardless of the construction of the former judgment, it remains true that Kendall still owed plaintiffs $1,506.33 on the purchase price of the land, no part of which has been paid, and that Kendall never received a deed to the land, nor held more than an equitable interest therein. Since this equitable interest in the land is not subject to a judgment lien under the California authorities, it is immaterial how the judgment in the ejectment suit should be construed.

[3] Assuming, without so deciding, that the respondent should have a legal right to foreclose her judgment lien upon the equitable interest of Kendall in the real property to satisfy her claim of $853 and accrued interest, it would be inequitable for her to do so until the vendor of the real property was first paid the ascertained unpaid balance of the purchase price in the sum of $1,506.33. The doctrine of a vendor's lien entitles the plaintiffs to that payment undiminished by any subsequent claim. It is superior to the rights of all persons, except bona fide purchasers for a valuable consideration without notice. It takes precedence over all claims and liens of judgment and attachment creditors of the purchaser. We are therefore of the opinion the respondent's claim by virtue of her assumed judgment lien is without merit.

The judgment is reversed, and the court is directed to render judgment quieting title in plaintiffs to the real property free from the asserted lien of the respondent.



20 Cal.App.2d 688

SHIVELY et al. v. KOCHMAN et al.

Civ. 10300.

District Court of Appeal, First District, Division 1, California.

May 7, 1937.

Rehearing Denied June 5, 1937.

Hearing Denied by Supreme Court July 1, 1937.

1. Appeal and error ⇐637, 640, 641

Order granting defendants' motion to set aside default judgment would not be affirmed on grounds that transcript on appeal was not printed as required by court rules and that bill of exceptions was not properly certified by trial judge and did not contain all papers used on hearing of motion, where prior to hearing of motion plaintiffs complied with court rules by filing printed transcript, record disclosed that bill of exceptions and transcript were in due form, and parties stipulated as to correctness of transcript "and that said appeal may be heard and determined thereon."

2. Appeal and error ⇐938(4)

When bill of exceptions has been settled by judge before whom proceeding was had, appellate court must assume for all purposes of reviewing action of trial court that bill contains a correct statement of what took place and that trial judge in settling bill has caused to be inserted therein

all matter relevant to ruling to which exception had been taken.

3. Appeal and error ⇐653(2)

When bill of exceptions has been duly certified and engrossed, reviewing court will not entertain proceedings to amend it, since if trial judge in settling bill refuses to allow bill of exceptions in accordance with facts, aggrieved party has statutory remedy to obtain a correct bill by means of application to reviewing court (Code Civ.Proc. § 652, as amended by St.1933, p. 1880).

4. Appeal and error ⇐653(2)

On appeal from order granting defendants' motion to set aside default judgment, appellate court *held* without power to incorporate in record documents which trial judge disallowed in settling bill of exceptions, where defendants requesting incorporation did not apply to reviewing court to obtain a correct bill under statute, and joined in stipulation that transcript was correct, and that appeal could be determined thereon (Code Civ.Proc. § 652, as amended by St. 1933, p. 1880).

5. Appeal and error ⇐659(3)

On appeal from order granting defendants' motion to set aside default judgment, defendants *held* not entitled to diminution of record by incorporating certain documents on ground that purpose of incorporation was merely to enlarge record on appeal and not to amend bill of exceptions, where documents were not brought before trial court, or called to its attention, and effect of incorporation would be to allow a respondent after filing of transcript on appeal to build up a new record on which to base new legal points in support of judgment or order appealed from not presented to or considered by trial court (Code Civ.Proc. § 953).

Appeal from Superior Court, City and County of San Francisco; George J. Steiger, Judge.

Action by J. H. Shively and others against I. M. Kochman and others. From an order granting defendants' motion to set aside a default judgment entered against defendants, plaintiffs appeal and defendants move to affirm the order and for a diminution of the record.

Defendants' motions denied.

S. Laz Lansburgh, of San Francisco (S. Joseph Theisen, of San Francisco, of counsel), for appellants.

Matthew J. Dooley, of San Francisco, for respondents.

KNIGHT, Justice.

[1] Plaintiffs appealed from an order granting defendants' motion to set aside a default judgment entered against defendants in an action to recover rent for an apartment house and damages resulting from injury to and loss of the furnishings therein during defendants' occupancy of the premises under a lease. The motion was based on grounds of mistake, inadvertence, and excusable neglect. Code Civ.Proc. § 473 (as amended by St.1933, p. 1851). The appeal was taken on a bill of exceptions, and thereafter plaintiffs filed a typewritten transcript on appeal and a printed opening brief. Approximately six months after the filing of the opening brief defendants served and filed herein notice of two motions, the first being to affirm the order appealed from on the grounds that the transcript on appeal was not printed as required by court rules, and that the bill of exceptions was not properly certified by the trial judge and did not contain all the papers used on the hearing of the motion to set aside the default judgment. Prior to the hearing of the motion, however, plaintiffs complied with the court rules by filing a printed transcript; and an inspection of the record shows that the bill of exceptions and the transcript are in due form; that is to say, the bill of exceptions bears the certificate of the trial judge that the bill was settled and allowed, and the respective parties have stipulated at the end of the transcript as to its correctness "and that the said appeal may be heard and determined thereon." The motion to affirm should therefore be denied.

The second motion is for diminution of the record. Defendants seek thereby to have included in the transcript and made part of the record on appeal certain court documents which they admit were excluded by the trial court from the bill of exceptions at the time of the settlement thereof. In this connection it appears that prior to the entry of the default the action was tried on the merits upon issues raised by a second amended complaint and the answer thereto, and as

to these defendants was decided in their favor; that a new trial was granted, but subsequently the trial court made a new order denying a new trial and modifying the original judgment, and still later set aside the last order on the ground that it was without jurisdiction to make the same. As the record then stood, the original order granting the new trial remained in force. Thereafter by leave of court plaintiffs filed an amended and supplemental complaint, which was served on defendants' counsel, but defendants failed to plead thereto within the time allowed therefor, and consequently judgment by default was taken against them. The documents defendants now seek to have incorporated in and made part of the record on appeal consist of the second amended complaint and the answer thereto, the findings of fact and conclusions of law, plaintiffs' notice of intention to move for a new trial, defendants' notice of motion for a modified judgment, the trial court's amended findings of fact and conclusions of law, and its modified judgment.

[2, 3] It is well established, however, that when a bill of exceptions has been settled by the judge before whom the proceeding was had, the appellate court must assume for all purposes of reviewing the action of the trial court that the bill contains a correct statement of what took place (Hyde v. Boyle, 89 Cal. 590, 26 P. 1092; Ritter v. Ritter, 103 Cal.App. 583, 284 P. 950), and that the trial judge in settling the bill has caused to be inserted therein all matter relevant to the ruling to which exception has been taken or will explain the same (Bedan v. Turney, 99 Cal. 649, 34 P. 442). In the event the trial judge in settling the bill refuses to allow a bill of exceptions in accordance with the facts, the aggrieved party is afforded full and adequate remedy by section 652 of the Code of Civil Procedure (as amended by St.1933, p. 1880) to obtain a correct bill by means of application to the reviewing court. In re Estate of Dolbeer, 147 Cal. 359, 81 P. 1098; Rhode v. Wattles, 114 Cal.App. 144, 299 P. 574. It is held, therefore, that when a bill has been duly certified and engrossed, the reviewing court will not entertain proceedings to amend the same. Merced Bank v. Price, 152 Cal. 697, 93 P. 866; Mendocino County v. Peters, 2 Cal.App. 24, 82 P. 1122.

[4] Here the bill of exceptions proposed by plaintiffs recited at the end thereof that "the foregoing comprises all the papers, documents and evidence offered, presented, introduced or used and all the proceedings had upon or concerning the matters therein referred to." The bill was duly served on defendants' counsel, and, as stated in the affidavit he has filed in support of the present motion, he proposed as amendment to said bill the insertion therein of copies of the documents he now seeks to have made part of the record on appeal, but the trial judge disallowed said amendments and settled the bill accordingly. Apparently defendants had no complaint to make at the time the bill was settled, because they made no effort to avail themselves of the provisions of said section 652 of the Code of Civil Procedure. In fact, they expressly concede that the documents they now seek to have made part of the record on appeal were never offered or received in evidence at the hearing of the motion to set aside the default. Moreover, it would seem that they were entirely satisfied with the record on appeal as filed because they joined in a stipulation at the end thereof that "the above and foregoing transcript on appeal is correct, that the same contains a true, full and correct copy of the Bill of Exceptions, the judgment roll, the order appealed from, the notice of appeal, and that the said appeal may be heard and determined thereon." Therefore, in the state of the record above set forth, and in view of the foregoing legal limitations governing reviewing courts, it is beyond the power of this court to incorporate any new matter in said bill.

[5] Defendants contend, however, that they are not seeking to amend the bill of exceptions; that the purpose of their motion is merely "to enlarge" the record on appeal under the authority of section 953 of the Code of Civil Procedure by bringing before the court on appeal certain documents which will assist in the determination of the appeal on the merits.

We find no merit in the above contention, first, for the reason that said section, according to its terms, applies only to "any paper or record * * * which was before the trial court"; and admittedly the documents in question here were not brought before the trial court or called to its attention at the hearing of the issue before it. Secondly, the obvious ef-

fect of granting the motion would be to allow a respondent, after the filing of a transcript on appeal, to build up a new record upon which to base new legal points in support of the judgment or order appealed from, not presented to or considered by the trial court in the determination of the matter out of which the appeal arose; and clearly this may not be done. In this regard the record before us shows that the single ground urged in the trial court for setting aside the default was mistake, inadvertence, and excusable neglect on the part of defendants' counsel in allowing the time to expire within which to plead to the amended and supplemental complaint; and the only evidence offered in support of the motion was the affidavit of defendants' counsel in which it was averred that the failure to answer was due to his mistake, inadvertence, and excusable neglect in omitting to make appropriate entry in his register of actions of the date of the expiration of the time to plead. Therefore, in reviewing the trial court's order granting said motion, it must be presumed that the same was based on the ground mentioned; and this presumption is amply fortified by the refusal of the trial court to allow the documents in question to become a part of the bill of exceptions on appeal. Now, however, as appears from the affidavits and briefs filed on behalf of defendants' present motion, the object in seeking to have said documents made part of the record on appeal is to lay an evidentiary foundation for new points to be made and considered on appeal in support of the trial court's order, which were not made before or considered by the trial court at the time of the hearing and determination of the proceeding then before it, the main new point in this respect being, as shown by said affidavits and briefs, that the third amended and supplemental complaint alleged no additional material facts, and that therefore the answer to the second amended complaint was legally sufficient to bar the entry of a judgment by default on the third amended and supplemental complaint. As previously indicated, the law in our opinion will not permit this to be done.

For the reasons stated, it is ordered that both motions be and the same are hereby denied.

We concur: TYLER, P. J.; CASHIN, J.

THOMPSON v. MUNICIPAL BOND CO.*

Civ. 11361.

District Court of Appeal, Second District, Division 2, California.

May 12, 1937.

Hearing Granted by Supreme Court July 9, 1937.

1. Appeal and error ⇐761

Rule requiring each point to be presented separately under appropriate heading showing nature of questions to be presented and points to be made *held* not complied with by brief containing headings "The Principle as Seen by Plaintiff," "The Principle as Seen by Defendant," "Statement of the Case," and "Detailed Statement," followed by other headings such as "The Defense," "Facts Show Right of Action for Deceit," "Abandonment," "Res Adjudicata" (Rules of the Supreme Court and District Courts of Appeal, rule 8, § 2).

2. Appeal and error ⇐761

Assignment of error in brief required by court rule should take form of one or more stated propositions which, if sustained, would lend reasonable support to appellant's demand for reversal of judgment (Rules of the Supreme Court and District Courts of Appeal, rule 8, § 2).

3. Appeal and error ⇐761

District Court of Appeals will not assume task of searching record for purpose of discovering errors not pointed out by counsel, but counsel has duty to comply with rule in its entirety requiring presentation of each point separately under appropriate heading showing nature of questions to be presented and points to be made (Rules of the Supreme Court and District Courts of Appeal, rule 8, § 2).

4. Appeal and error ⇐761

Rule requiring each point to be presented separately under appropriate heading showing nature of questions to be presented and points to be made is not mere technical requirement, but is prescribed for purpose of facilitating disposition of cases on appeal and directing court's attention to specific errors of law alleged to have been committed by trial court (Rules of the Supreme Court and District Courts of Appeal, rule 8, § 2).

5. Appeal and error ⇐766

Appeal *held* to be required to be dismissed, where appellant in opening brief failed to present each point separately un-

*For subsequent opinion see 73 P.2d 274.

der appropriate heading showing nature of questions to be presented and points to be made, as required by court rule (Rules of the Supreme Court and District Courts of Appeal, rule 8, § 2).

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action ex contractu by D. E. Thompson against the Municipal Bond Company. From a judgment for the defendant, the plaintiff appeals.

Appeal dismissed.

Roger Marchetti and Calvin E. Woodside, by Calvin E. Woodside, of Los Angeles, for appellant.

Donald J. Dunne and Bailie, Turner & Lake, all of Los Angeles, for respondent.

McCOMB, Justice.

This is an appeal from a judgment in favor of respondent after trial before the court without a jury, in an action ex contractu.

This is the sole question necessary for us to determine:

Has appellant in his opening brief complied with the requirements of rule VIII, section 2, of the Rules of the Supreme Court and District Courts of Appeal of the State of California by presenting each point separately under an appropriate heading showing the nature of the questions to be presented or the points to be made?

[1, 2] This question must be answered in the negative. It is settled that to meet the requirements of rule VIII, section 2 (Rules of the Supreme Court and District Courts of Appeal of the State of California, page 10), the assignment of error must take the form of one or more stated propositions which, if sustained, will lend support to appellant's demand for a reversal of the judgment. Adams v. Standard Accident Ins. Co., 124 Cal.App. 393, 394, 12 P.(2d) 464; Graybeal v. Press-Telegram Publishing Co., 14 Cal.App.(2d) 252, 253, 57 P.(2d) 1343; Lady v. Smith (Cal.App.) 65 P.(2d) 76.

In Lady v. Smith, supra, the headings in appellant's brief were these:

(1) Introductory Statement.
(2) Statement of the Case.
(3) Argument.
(4) Conclusion.

In the instant case the headings in appellant's brief are:

(1) The Principle as Seen by Plaintiff.
(2) The Principle as Seen by Defendant.
(3) Statement of the Case.
(4) Detailed Statement.
(5) In the Present Action the Plaintiff's Case Is on the Contract.
(6) The Contract of March 14th, 1932.
(7) The Defense.
(8) The Decision.
(9) Action for Deceit Affirms Contract and Is Not Inconsistent With It.
(10) Nature of Action No. 364,437.
(11) The Original Liability of Officers and Directors Is of Primary Importance as Showing Damage in an Action for Deceit in Inducing a Contract of Release.
(12) Five Requirements of Action for Deceit.
(13) Facts Show Right of Action for Deceit.
(14) Defendant's Letter of June 29th, 1934.
(15) Plaintiff's Letter of July 18th, 1934.
(16) Defendant's Letter of August 1st, 1934.
(17) Letters Confirm Nature of Action.
(18) Amended Complaints Assume Fraud.
(19) Plaintiff Waived No Rights While Action No. 364,437 Was Pending.
(20) Pending Rights at Time of Dismissal.
(21) Authority of Attorney.
(22) Complaints Only Evidence Against Plaintiff.
(23) Compromise Agreement Not a Sales Contract.
(24) Abandonment.
(25) No Intention to Abandon Contract Shown.
(26) No Evidence Against Plaintiff of Failure of Consideration.
(27) Supposing There Was No Right of Action.
(28) Res Adjudicata.
(29) Election of Remedies.
(30) Estoppel.
(31) Acceleration Clause.
(32) Insolvency Is a Breach of Contract.
(33) Conclusion.

As stated in Kindred v. Pacific Automobile Insurance Company (Cal.App.) 66 P.(2d) 1252, a recent case involving a similar

question, it is manifest that appellant has failed to meet the requirements of rule VIII, section 2, supra.

[3, 4] This court has repeatedly held that it will not assume the task of searching the record for the purpose of discovering errors not pointed out by counsel, and in the present case appellant has failed to direct our attention to any error of the trial court. It is the duty of counsel to comply with the requirements of rule VIII in its entirety. Battson v. Kirkpatrick, 11 Cal.App.(2d) 283, 53 P.(2d) 762; Ferslew v. Andersen, 11 Cal.App.(2d) 400, 53 P.(2d) 768; Bernstein v. Congregation Anshi Sfart, 14 Cal.App.(2d) 96, 57 P.(2d) 954. This rule is not a mere technical requirement but is prescribed for the purpose of facilitating disposition of questions upon appeal and directing the court's attention to the specific errors of law alleged to have been committed by the trial court.

[5] For the foregoing reasons the appeal is dismissed.

We concur: CRAIL, P. J.; WOOD, J.



20 Cal.App.2d 708

MASSETTI v. MADERA CANAL & IRRIGATION CO. et al.

Civ. 5659.

District Court of Appeal, Third District, California.

May 7, 1937.

1. Waters and water courses ⇐263

Evidence authorized recovery for destruction of plaintiff's tomato crop by flooding of water permitted to escape from defendant's irrigation canal.

2. Waters and water courses ⇐263

In action for destruction of tomato crop by water permitted to escape from defendant's irrigation canal, evidence that defendant refused request of company building highway bridge across canal to reduce allegedly excessive quantity of water in canal unless defendant were paid $100 per day and that water rose soon after company refused to pay such amount *held* competent as supporting plaintiff's contention that defendant carried excess flow in canal to force company to pay $100 per day for reduction.

3. Waters and water courses ⇐262

Owners of irrigation canals and ditches, whether water is for private use or for sale to public, are liable for damages to crops or property of adjacent owners resulting from overflow or leakage on account of owner's negligence in construction, maintenance or operation.

4. Waters and water courses ⇐263

Recovery for destruction of crop by water permitted to escape from defendant's irrigation canal, which sold water to public, *held* not precluded by evidence that a quantity of water percolated through banks of canal and contributed to quantity which overflowed banks.

5. Eminent domain ⇐92

Property owner adjacent to canal is entitled to recover damage to his crop negligently caused by permitting water to seep through banks of canal maintained for purpose of distributing water for public use, in view of constitutional provision against damaging private property for public use (Const. art. 1, § 14).

6. Appeal and error ⇐1011(1)

Where there is conflict of evidence with respect to issue, reviewing court cannot disturb judgment in so far as it resolves issue.

7. Licenses ⇐44(3)

Provision of deed "reserving from said land for reservoir purposes all land which at high water is covered with water" *held* at most to create mere "license," as distinguished from "easement" (Civ.Code, § 1104).

[Ed. Note.—For other definitions of "Easement" and "License," see Words & Phrases.]

8. Waters and water courses ⇐156(1)

Provision of deed "reserving from said land for reservoir purposes all land which at high water is covered with water" *held* void for uncertainty (Civ.Code, § 1104).

9. Waters and water courses ⇐156(2)

Deed reserving "for reservoir purposes" all land which is ordinarily covered during "high water" created by storms or floods occurring in ordinary processes of nature does not include land that is willfully or negligently flooded by artificial means, as by deliberately or negligently conveying into canal quantity of water in excess of its maximum capacity.

10. Waters and water courses ⇐164

Right by prescription to flood land with water or to use it for construction and maintenance of reservoir thereon may be established only by proof of open, notorious, exclusive, and continuous use of property for that purpose for five years or more.

11. Evidence ⇐244(1)

In action for destruction of tomato crop by flooding of water permitted to escape from defendant irrigation company's canal, testimony of plaintiff's brother that defendant's manager assured him that there was no danger of plaintiff's land being flooded *held* competent to refute defendant's claim of prescriptive right to flood plaintiff's land with water.

12. Waters and water courses ⇐263

In action for destruction of tomato crop by flooding of water permitted to escape from defendant's irrigation canal, testimony that, at time plaintiff's crop was destroyed, water from defendant's canal flooded land of witness situated a mile above plaintiff's land and 300 feet from canal, and that tenants of small cottage on witness' land vacated premises on account of flood water, was competent to show that canal was then permitted to carry water in excess of its maximum capacity.

13. Appeal and error ⇐1050(1)
Trial ⇐90

Overruling objection to question already answered *held* not error, since proper motion was motion to strike out objectionable portion of answer, and since answer was harmless in view of fact that same witness had previously testified to same effect.

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Action by Fred C. Massetti, a minor, by Secondo Massetti, his guardian ad litem, against the Madera Canal & Irrigation Company and others. From a judgment against it, the named defendant appeals.

Affirmed.

David E. Peckinpah and Lee N. Barber, both of Fresno, for appellant.

Conley, Conley & Conley, of Fresno, for respondent.

Mr. Acting Presiding Justice THOMPSON delivered the opinion of the court.

In a suit for damages resulting from the destruction of a tomato crop on account of the flooding of water which was negligently permitted to escape from an irrigation canal the plaintiff secured a judgment which was rendered pursuant to the verdict of a jury for the sum of $1,083.33 against the Madera Canal & Irrigation Company. From that judgment the irrigation company has appealed.

It is contended the judgment is not supported by the evidence for the reason that appellant claims title to an easement to flood the land upon which the plaintiff's tomato crop was planted and because it does not appear that the crop was destroyed by means of water which overflowed from the canal, rather than that which percolated through the walls of the canal. It is also asserted the court erred in receiving evidence which was incompetent and prejudicial.

For many years the Madera Canal & Irrigation Company has been the owner and entitled to divert from the Fresno river at a point about two miles easterly of the city of Madera 200 second-feet of water. During that period of time it owned and operated a system of canals to convey the water to agricultural lands southerly of the city of Madera for sale and public use for irrigation purposes. The appellant maintains a dam in the Fresno river just below the point where the main canal exists. A short distance from that place the canal divides into two main branches, one of which extends south for several miles and thence westerly, with numerous lateral branches. This easterly and southerly branch of the canal is not involved in this litigation. The westerly branch of the main canal extends through the city of Madera and thence southwesterly a distance of several miles. It also contains a large number of lateral branches. These main canals were designed to each carry a maximum flow of approximately 100 second-feet of water.

In November, 1934, the plaintiff leased two acres of land just southwest of Madera in the south half of the southwest quarter of the northwest quarter of section 25, township 11 south, range 17 east, in Madera county. This two-acre tract of land occupies a slight depression in close proximity to the north main branch of the appellant's canal. In the spring of 1935, the plaintiff cultivated his land and transplanted therein some 18,000 tomato vines

to be raised for market. These vines were properly cared for and were in a healthy condition of development until they were drowned out and destroyed by the overflowing of water from the appellant's canal. This suit for damages for loss of the tomato crop was then commenced against the appellant for negligently permitting the water to overflow the banks of the canal and to seep therefrom so as to flood and destroy the respondent's crop. The cause was tried with a jury, which returned a verdict in favor of the plaintiff. A judgment for damages was rendered against the irrigation company. A motion for judgment notwithstanding the verdict was presented and denied. A motion for new trial was also denied. From that judgment the Madera Canal & Irrigation Company has appealed.

[1] We are of the opinion the judgment is adequately supported by the evidence. There is a conflict of testimony, but substantial evidence exists in support of the judgment. The plaintiff testified that he had lived in the vicinity of his two-acre tract of land for nineteen years and he had never seen it flooded. The soil of the tomato patch was a sandy adobe soil. He said that he successfully raised a crop of tomatoes on that same land in 1934, and that he previously had no trouble from an excess of water. Mr. Emmert, the manager of the Madera Canal & Irrigation Company, told the plaintiff's brother in 1934 that they need not fear a flooding of the tomato patch since the company had installed a drain pipe to convey overflow water back into the canal. Early in the spring of 1935 the plaintiff planted some 18,000 tomato vines, which he carefully cultivated and which developed in fine condition until they were destroyed in May. The capacity of the canal was approximately 100 second-feet of water. The appellant's engineer reported that in 1935 the canal was carrying 113 second-feet of water. The plaintiff testified that the water in the canal was the highest in 1935 that he had ever seen it. The canal was obstructed with grass, weeds and debris. Mr. Morrison, a witness who was called in behalf of the plaintiff, testified that: "I observed the canal to be badly grown up with weeds and rushes and the flow obstructed for that reason and on one occasion I observed a stump under a bridge east of the town, large stump that obstructed the flow."

May 3rd the plaintiff observed "water coming over the banks" and through gopher holes. He examined the drain pipe and found that it was obstructed so that no water flowed through it. He said in that regard, "I found none flowing out of it." He plugged the gopher holes and dug a lateral ditch to carry off the overflow water, but was unable to prevent the flooding of his land. On that day he called the manager of the irrigation company and informed him of the defective condition of the canal banks and the danger to his tomato crop. He said: "I told him we would have to do something about the tomatoes or we would lose them all and he asked for suggestions and I told him to lower the ditch and he said he couldn't, he would lose money if he closed the water."

The manager promised to send out a team and men that day to repair the walls of the canal, but failed to do so. For several days the plaintiff worked to stop the overflow of water and the flooding of his tomato patch, by digging a ditch and attempting to close the apertures over which the water flowed from the canal, but failed in his attempt. He repeatedly asked the agents of appellant to stop the flow. While it appears that some work was done on the canal by the irrigation company, it was inadequate and by May 7th the plaintiff's land was completely flooded and the crop was entirely destroyed. Ten acres of the flat was covered with water. It remained in that flooded condition until June.

There is substantial evidence to the effect that the plaintiff's land was flooded and his crop destroyed by reason of the negligent carrying of a quantity of water in excess of the maximum capacity of the canal, and because of the obstruction in the drain pipe which caused overflowing of the banks of the stream. The brother of the plaintiff testified that he saw water flowing over the bank in a stream 50 or 60 feet in width, and that some one sought to close an aperture by merely placing an old mattress in it. There is some evidence that the damage to the crop was not caused by seepage of water through the banks of the canal. This evidence may be unsatisfactory to establish that fact. But there is ample proof that a large quantity of water did overflow the banks and flood the field. It satisfactorily appears that the flooding of the field occurred largely

because of the overflowing of the banks and the obstruction of the drain pipe.

[2] Evidence was adduced over the objections of the appellant that the Union Paving Company was engaged in April in constructing a highway bridge at Madera across the canal in question. Mr. Morrison, the superintendent of that construction company, testified that he interviewed the manager of the irrigation company on several occasions, attempting to persuade him to reduce the quantity of water flowing in the canal long enough to enable them to construct the abutments for the bridge. The last conversation regarding that subject was in April. The irrigation company refused to reduce the quantity of water in the canal unless they were paid $100 a day for the time during which the water was reduced. The construction company refused to pay that amount. Morrison said that the construction company then attempted to drive down sheeting at the point where the abutments were to be placed, but that: "At that time, shortly thereafter the water began to rise and continually rose to its approximate peak, it was as full as it could get, and stayed there until the completion of the pouring of the east deck, the completion of the pouring against the siding."

The sheeting was washed out by the high flood. Morrison complained to the irrigation company of carrying an excessive flow of water in the canal. He said that he told Mr. Emmert: "Your own engineer has given me a report it was carrying 113 second feet."

The respondent contends that the irrigation company increased the flow in the canal to force the construction company to pay its demand of $100 a day during the time the water was reduced so as to enable it to construct the abutments of the bridge. It is claimed this was the reason for carrying an excess quantity of water in the canal which caused it to overflow the banks and destroy the tomato crop. There may be little merit in that contention, but the evidence is susceptible of that inference, and we are unable to say it was not competent for the consideration of the jury.

Taken as a whole, the evidence appears to be adequate to support the implied findings of the jury to the effect that the destruction of plaintiff's crop of tomatoes was the result of appellant's negligence in carrying an excess quantity of water in the canal and permitting it to overflow and flood the land so as to destroy the crop. The judgment is therefore sufficiently supported by the evidence.

[3] The rule is well established in California that the owners of canals and ditches which are maintained for the purpose of conveying water for irrigation purposes either for private use or for sale to the public are liable for damages to the crops or property of adjacent owners resulting from the overflow or leakage therefrom on account of negligence on the part of the owners thereof in the construction, maintenance or operation of the system. Ketcham v. Modesto Irr. Dist., 135 Cal. App. 180, 26 P.(2d) 876; Truman v. Sutter-Butte Canal Co., 76 Cal.App. 293, 244 P. 923; Nola v. Orlando, 119 Cal.App. 518, 6 P.(2d) 984; 26 Cal.Jur. 152, § 356; 67 C.J. 1423, § 1095; 15 R.C.L. 486, § 38; 3 Kinney on Irr. and Water Rights (2d Ed.) 3085, § 1674.

[4, 5] It is immaterial that the evidence may also show that a quantity of water percolated through the banks of the canal and contributed to the quantity which overflowed its banks so as to flood the plaintiff's field and destroy his crop. It has been definitely held that an adjacent property owner is entitled to recover damages to his crop which is negligently caused by permitting water to seep through the banks of a canal which is maintained for the purpose of distributing water for public use. This doctrine is based on the provisions of article 1, section 14 of the Constitution. In denying a hearing in the case of Tormey v. Anderson-Cottonwood Irr. Dist., 53 Cal.App. 559, at page 568, 200 P. 814, the Supreme Court said: "In so far as the opinion of the District Court of Appeal appears to indicate that the plaintiffs cannot recover damages for the injury to their land unless it appears that the flooding thereof which caused the injury was the proximate result of the negligence of the defendant in the construction and maintenance of its canal, we disapprove the same. The canal is constructed for public purposes and to serve the purpose of distribution of water to public use. Apparently the damage to the plaintiffs is caused directly by seepage of water carried in said canal through the intervening soil onto the adjoining land of the plaintiffs. In such cases the plaintiff is secured a right to damages by the constitutional provision that private property

shall not be damaged for public use. Article I, section 14. In such cases the care that may be taken in the construction of the public improvement which causes the damage is wholly immaterial to the right of the plaintiff to recover damage, if the improvement causes it. This was expressly decided in Reardon v. San Francisco, 66 Cal. [492] 505, 6 P. 317, 56 Am.Rep. 109, and Eachus v. Los Angeles, [Consolidated Electric Ry. Co.], 103 Cal. 614, 37 P. 750, 42 Am.St.Rep. 149."

[6] We are of the opinion the judgment and the implied finding of the jury are amply supported by the evidence, to the effect that the appellant was not the owner of an easement which was granted to its predecessor of title, or which was acquired by prescription, to flood the land of plaintiff upon which his tomato crop was planted. At least there is a conflict of evidence with respect to that issue and we may therefore not disturb the judgment on appeal in that regard.

The appellant contends that it is the owner of an easement authorizing it to flood the plaintiff's land in question by virtue of a deed of conveyance from Thomas E. Hughes, who was a member of the Fresno Dam & Canal Company, from which the appellant derived title. The deed from Hughes to Goode and Noble was received in evidence. It was executed June 2, 1890, and contained the following clause: "Reserving a strip of land thirty (30) feet wide from the west and south sides of said land for purposes of a public highway. *Also reserving from said land for reservoir purposes all land which at high water is covered with water.*"

It is asserted that the preceding reservation of land for "reservoir purposes" created an easement in favor of the appellant under the provisions of section 1104 of the Civil Code estopping the plaintiff from claiming damages for the loss of his crop from flooding the land. Section 1104 provides: "A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed."

In support of the appellant's asserted easement to flood the land of plaintiff it cites the following authorities: Vargas v. Maderos, 191 Cal. 1, 214 P. 849, Conner v. Lowery, 94 Cal.App. 323, 271 P. 118, and Ricioli v. Lynch, 65 Cal.App. 53, 223 P. 88.

[7] The character of the purported right of the appellant to "all land which at high water is covered with water" for "reservoir purposes" is a mere license as distinguished from an easement. 2 Tiffany on Real Property (2d Ed.) 1201, § 349. In defining the term "license" as distinguished from an "easement," the author of the text last cited says, at page 1203: "A license may be to do any of an almost infinite variety of things on another's land. Thus, one may have a license to *flood land*, to erect buildings or other structures thereon, to pass on the land, to maintain a ditch, to cut timber * * *."

A privilege similar to the one relied upon by the appellant in this case is termed in the case of Lange v. Waters, 156 Cal. 142, 103 P. 889, 891, 19 Ann.Cas. 1207, as an *exception* to the grant, as distinguished from a reservation. 4 Thompson on Real Property, 367, § 3257. In the case last cited it is said that such an exception reserved by the terms of a deed of conveyance "is to be construed strictly against the grantor."

[8, 9] In the present case we are of the opinion the language of the deed relied upon by the appellant as a reservation of land "for reservoir purposes" is void for uncertainty. Lange v. Waters, 156 Cal. 142, 103 P. 889, 892, 19 Ann.Cas. 1207; Nineteenth Realty Co. v. Diggs, 134 Cal. App. 278, 285, 25 P.(2d) 522; Simpson v. Schurra, 91 Cal.App. 640, 647, 267 P. 384. In holding that an exception to a grant which was attempted to be reserved to the grantor by the terms of a deed was void for uncertainty, the court in the case of Lange v. Waters, supra, cited and summarized the case of Darling v. Crowell, 6 N.H. 421, as follows: "Where in a grant of land there was an exception of one acre and a half reserved for the use of flowing water for a mill, without location of the land, the exception was held void for uncertainty."

There is nothing in section 1104 of the Civil Code, nor in the three cases above cited, upon which the appellant relies, in conflict with what we have said regarding

the invalidity of the alleged reservation for uncertainty. In the cases cited, the exceptions from the grants specifically refer to rights of ways which had previously been used for long periods of time. The location and indentification of the excepted portions of lands conveyed were readily ascertainable. By the express terms of section 1104 of the Civil Code the easements which are thereby recognized as valid are those which are reserved or "transferred *in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred.*"

In the present case there is no evidence that any portion of the grantor's land was ever previously or at all used for the construction or maintenance of *reservoirs.* It will be observed that the language in question does not purport to reserve a license to "flood the land of the grantor." It merely purports to except from the grant "all land which *at high water* is covered with water," *for reservoir purposes.* No reservoirs were ever constructed on the plaintiff's premises. The plaintiff and other witnesses testified that they had never known that land to be flooded with water. The reservation of all land which is covered by water during "high water" is too indefinite and uncertain to exclude therefrom any particular portion of the property. It is said in 4 Thompson on Real Property, 381, § 3272: "A part excepted from a grant must be as clearly described as the parcel granted." Assuming, without so deciding, that the language of the deed relied upon by the appellant may be sufficiently specific to reserve "for reservoir purposes" all land which is ordinarily covered during "high water" created by storms or floods occurring in the ordinary processes of nature, certainly it does not include land that is willfully or negligently flooded by artificial means, for instance, as the evidence of this case suggests, by deliberately conveying into the canal a quantity of water in excess of the maximum capacity of the canal. The language of the exception in the deed could have no such absurd construction.

[10] The record contains no substantial evidence that the appellant procured by prescription an easement to flood the land of plaintiff, or to use it for reservoir purposes. A right by prescription to flood land with water or to use it for the construction and maintenance of reservoirs thereon, may be acquired only by proof of open, notorious, exclusive, and continuous use of the property for that purpose for a period of five years or more. Ketcham v. Modesto, Irr. Dist., 135 Cal.App. 180, 191, 26 P.(2d) 876; 1 Thompson on Real Property, 487, § 377 et seq. ; 19 C.J. 878, § 32 et seq. The evidence in this case shows no such use of the plaintiff's property.

[11] It was not prejudicial error for the court to permit the brother of the plaintiff to testify over the objection of the appellant that Mr. Emmert, the manager of the Modesto Canal & Irrigation Company, assured him there was no danger of his land being flooded. In response to the question, "Do you think that there will be a day or time this here ground might be flooded or any chances" (of it) ? Mr. Emmert replied: "No, since I got that pipe in there, (and) that bank piled up, you needn't worry." If that evidence is competent for no other purpose, it tends to refute appellant's claim of a prescriptive right to flood the land with water. It shows that the appellant had notice that the plaintiff claimed a right to cultivate that land and to produce thereon a crop of tomatoes, to which the appellant then made no objection or claim of easement.

[12] It was not error for the court to permit the witness Sambueso to testify, over the objection of the appellant, that in the early part of May, 1935, which is the very time when plaintiff's crop was destroyed, the water from this same canal flooded his property which is situated about a mile above the plaintiff's land and 300 feet distant from the canal, and that tenants of a small cottage belonging to the witness and situated at that place vacated the premises on account of the flood water. This evidence was competent as tending to show that the canal was then permitted to carry a quantity of water in excess of its maximum capacity.

[13] Nor was the following ruling of the court erroneous. The plaintiff was being examined with respect to the damage which he sustained as a result of flooding his premises. This colloquy occurred:

"Q. Will you state to the jury whether or not the plants, tomato plants growing on the Noble land were destroyed? A. They were totally destroyed.

"Q. By means of what? A. By water coming over the banks.

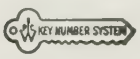
"Mr. Barber (Attorney for the Defendants): Object as calling for the conclusion of the witness.

"The Court: The objection is overruled."

The question had been answered. The proper motion was to strike out the objectionable portion of the answer. This was not done. Moreover, the answer was harmless. The witness had previously testified that the damage to his crop occurred from the overflowing of the banks of the canal, and not by seepage. Undoubtedly the damage was done chiefly by the overflowing of the banks. Large quantities of water flowed upon plaintiff's land from that source.

The judgment is affirmed.

We concur: PLUMMER, J.; HELD, Justice pro tem.



REYNOLDS et al. v. BARRETT, Building Inspector. *

Civ. 10102.

District Court of Appeal, First District, Division 1, California.

May 11, 1937.

Rehearing Denied June 10, 1937.

Hearing Granted by Supreme Court July 9, 1937.

1. Municipal corporations ⇐626

Where property on three sides of plaintiffs' property was open for business uses and where evidence sustained finding that there was monopoly of ownership in business district, zoning ordinance was discriminatory in so far as it placed plaintiffs' property outside business zone.

2. Courts ⇐114

Nunc pro tunc order made many months after entry of judgment admitting judgment rolls in prior cases in evidence for purpose of supporting finding of res judicata *held* error.

3. Courts ⇐114

Nunc pro tunc order can be made only to show something done which was actually done but not entered in the record, and it cannot be made to declare that something was done which was in fact not done.

4. Municipal corporations ⇐63(2)

Courts have power to determine whether or not zoning ordinances are arbitrary and discriminatory.

5. Appeal and error ⇐1010(1)

Where court found on proper and sufficient evidence that zoning ordinance was arbitrary and discriminatory in so far as it affected plaintiffs' property, such finding was binding on appellate court.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Francis Edward Reynolds and another against Ralph Barrett, as Building Inspector of the City of Piedmont. From an adverse judgment, defendant appeals.

Affirmed.

Girard N. Richardson, City Atty., of Piedmont, and Robinson, Price & MacDonald, of Oakland, for appellant.

Bestor Robinson and Breed, Burpee & Robinson, all of Oakland, for respondents.

TYLER, Presiding Justice.

Action instituted by plaintiffs, as owners of property outside of a business zone, to compel the building inspector of the city of Piedmont to issue them a building permit to erect a gasoline station, a business structure. The city has adopted three zoning ordinances, numbered 196, 268, and 315. According to its terms the second repealed the first, and the present ordinance, passed March 21, 1929, repealed the second. The ordinances have been the subject of years of extensive litigation, involving the present and other adjacent properties. Ordinance 268 first came under judicial scrutiny in the case of Wickham v. Becker, 96 Cal.App. 443, 274 P. 397, and it was held to be void on the ground that it created a monopoly. The same determination was made in Andrews v. City of Piedmont, 100 Cal.App. 700, 281 P. 78. A like ruling was upheld with reference to the parcel of land here involved in Reynolds v. City of Piedmont, 100 Cal.App. 802, 281 P. 79, and in Harris v. City of Piedmont, No. 109,838 the same conclusion was reached by the superior court with reference to a parcel of property adjacent to and immediately to the west of the property here involved, where it was held that the present ordinance, No. 315, was void so far as it affected the property involved

*For subsequent opinion see 83 P.2d 29.

for the reasons that it created a monopoly and was discriminatory. The case was appealed but was subsequently dismissed. There was tried contemporaneously with the Harris Case the action of Langstroth v. City of Piedmont. The parcel of land in that case was far removed from the business centers and the trial court found that the plaintiff was not within any reasonable or logical extension of such centers and could not therefore assert the validity of the ordinance. The judgment was affirmed on appeal. Langstroth v. City of Piedmont, 5 Cal.App.(2d) 146, 42 P.(2d) 356.

The present ordinance, No. 315, was involved in Wheat v. Barrett, 210 Cal. 193, 290 P. 1033. In that case judgment had been rendered opening certain property in lower Piedmont to business uses on the ground of the invalidity of ordinance No. 268. Pending an appeal ordinance No. 315 was passed and it was urged before this court that the writ of mandate issued against the building inspector should be recalled on the ground that ordinance No. 315 had superseded ordinance 268 and so far had not been declared invalid. This court agreed with the contention and in addition held, without presentation of evidence before it concerning monopoly, that ordinance No. 315 was valid. On rehearing, the supreme court adopted as its opinion the opinion of this court, with the exception of the last two paragraphs thereof which determined ordinance No. 315 to be valid.

The present case was tried before the same judge who decided the Harris and Langstroth Cases, above referred to. The court among other things found, in substance, that under the ordinance two business districts were created, one known as the Highland business district, where plaintiffs' property is situated, the other as Grand avenue business district. It further found that the two districts were so separated by difference in elevation, by street alignment, and by distance as to be noncompetitive; that they were separate portions of the city; that a monopoly of ownership exists as to said Highland business district, in that the said entire business district, except only property devoted to public use is entirely owned by one corporation; that a monopoly of use exists in said business district and there is no room available for expansion; that the ordinance is discriminatory and arbitrary as to plaintiffs' property; that property immediately to the west is by said ordinance open to business uses and is in fact occupied by the city of Piedmont for the purpose of conducting thereon a municipal garage, a fire department, and a city hall; that the property to the east is open to business uses; that the property to the south is used for the maintenance of a fraternal meeting hall and a school; that there is no difference with reference to its use for retail business purposes between the character of plaintiffs' property and the character of the property surrounding the same, either immediately or across the street; that its use for business purposes will not endanger the safety, health, or general welfare of the people; that the area comprised within the highland district is the same as contained in ordinance No. 268. The court further found that the question had been conclusively determined in a prior action.

[1-5] There is ample evidence in the record to sustain the findings that there is a monopoly of ownership in the Highland business district as it is owned by one corporation, that the ordinance is discriminatory in so far as it affects plaintiffs' property, and also that the ordinance failed to provide an adequate business area. To support the claim of res adjudicata, plaintiff offered in evidence certain judgment rolls in cases above referred to. For some reason the record does not disclose they were not admitted but merely marked for identification. Many months after the making and entry of judgment herein a nunc pro tunc order was made by the trial court admitting these rolls in evidence, evidently for the purpose of supporting the finding of res adjudicata. This constituted error, as such an order can be made only to show something done which was actually done but not entered in the record, and it cannot be made to declare that something was done which was in fact not done. We do not deem the various questions raised as to the evidence and pleading of this subject to be necessary to a disposition of the case for, assuming the finding of res adjudicata to be unsupported, the other grounds of the decision are in no manner affected thereby and are fully supported by the evidence as set forth in the findings above narrated. Courts have the power to determine whether or not zoning ordinances are arbitrary and discriminatory. The court having found upon proper and sufficient evidence that such is the character of the ordinance in question in so

far as it affects plaintiffs' property, such finding is binding upon the appellate court.

For the reasons given the judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.



20 Cal.App.2d 650

PEOPLE v. BUYLE.

Cr. 1551.

District Court of Appeal, Third District, California.

May 3, 1937.

Hearing Denied by Supreme Court June 2, 1937.

1. Criminal law ⇐1023(8)

Order denying motion in arrest of judgment is not appealable.

2. Criminal law ⇐260(11)

Statement of court trying without jury a prosecution for statutory offense of malicious and reckless possession of dynamite, that he had omitted from consideration the testimony of feigned accomplice, did not require that transcript be read and cause considered as though testimony of feigned accomplice were eliminated therefrom, where no motion to strike testimony of accomplice was made, record did not indicate improbability or untruthfulness of accomplice's testimony, and statements made by defendant on night of arrest corroborated accomplice's testimony (Gen.Laws 1931, Act 2433, § 5).

3. Criminal law ⇐507(4)

Testimony of accomplice need not be corroborated by other evidence as required by statute, where accomplice is only a feigned accomplice (Pen.Code, § 1111).

4. Explosives ⇐4

Under statutes permitting prosecution, as principals, of all persons concerned in commission of offense, automobile occupant who had knowledge that dynamite was in automobile could be convicted for statutory offense of malicious and reckless possession of dynamite, regardless of whether any portion of dynamite was actually on person of occupant, or on persons of any other people in automobile (Pen.Code, §§ 31, 971; Gen.Laws 1931, Act 2433, § 5).

5. Explosives ⇐4

Under statutes permitting prosecution, as principals, of all persons concerned in commission of offense, possession of dynamite by any one of occupants of automobile was possession of all of the occupants, every one of whom could be tried and punished as principal for statutory offense of malicious and reckless possession of dynamite (Pen.Code, §§ 31, 971; Gen.Laws 1931, Act 2433, § 5).

6. Statutes ⇐105(1)

Constitutional provision requiring that every act embrace but one subject expressed in its title must be liberally construed, and a reasonably intelligent reference to the subject is sufficient (Const. art. 4, § 24).

7. Statutes ⇐118(1)

Provision, in act entitled "An act to protect life and property against the careless and malicious use or handling of dynamite and other explosives," prohibiting malicious and reckless possession of dynamite, *held* not violative of constitutional requirement that act should embrace but one subject expressed in its title, since provision was in furtherance of purpose of act to protect life and property, words "use" and "handling" including possession (Gen.Laws 1931, Act 2433, § 5; Const. art. 4, § 24).

[Ed. Note.—For other definitions of "Use; Used," see Words & Phrases.]

8. Statutes ⇐109

Title to act need not embrace a catalogue of all of contents of act.

9. Statutes ⇐211

Act whose title contains words of general scope is not limited by particular or descriptive words used in different sections of act.

10. Explosives ⇐2

Purpose of statute relating to careless and malicious use or handling of dynamite and other explosives was to protect life and property (Gen.Laws 1931, Act 2433).

11. Statutes ⇐109

Under constitutional provision requiring every act to embrace but one subject expressed in title, provisions which are logically germane to title may be included in act (Const. art. 4, § 24).

12. Explosives ⇐5

Evidence that gang boss on pier in San Francisco carried fuses in automobile in which dynamite was being transported, and

that purpose of trip was to "get" some strike breakers, warranted conviction for statutory offense of malicious and reckless possession of dynamite (Gen.Laws 1931, Act 2433, § 5).

13. Explosives ⇐2

Statute declaring that persons who are not regularly engaged in manufacture, sale, transportation, or legitimate use of high explosives, and who are discovered in possession thereof, shall be presumed guilty of reckless and malicious possession, *held* not unconstitutional (Gen.Laws 1931, Act 2433, § 6).

Appeal from Superior Court, Stanislaus County; Roy B. Maxey, Judge.

Alphons Buyle was convicted of malicious and reckless possession of dynamite, and he appeals.

Affirmed.

Aaron Sapiro, of Los Angeles, and Robert B. Fowler, of Modesto, for appellant.

U. S. Webb, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER delivered the opinion of the court.

The appellant in this case was tried before the court sitting without a jury, and found guilty of an offense based upon section 5 of the act known as Act 2433, Deering's General Laws of California 1931, p. 1161. From the judgment following this conviction, the denial of his motion for new trial, and denial of motion in arrest of judgment, the appellant appeals.

[1] As no appeal lies from the denial of a motion in arrest of judgment, that portion of the attempted appeal may be here dismissed.

Section 5 of the act referred to, so far as the offense of the appellant is concerned, relates to the reckless and malicious possession of certain explosives on the highway, where people pass and repass in the county of Stanislaus.

The offense with which the appellant was charged and convicted is really a companion case with that of People v. Fitzgerald et al., reported in 14 Cal.App.(2d) 180, 58 P.(2d) 718, certiorari denied by Supreme Court, 57 S.Ct. 115, 81 L.Ed. 437, to which reference is hereby made for a more detailed statement than is thought necessary to be made in this opinion.

The appellant urges as grounds for reversal the unconstitutionality of sections 5 and 6 of the act referred to, and, also, the insufficiency of the evidence to sustain the judgment of conviction, for the reason that the appellant did not have actual, physical, or manual possession of the dynamite referred to in the testimony; that such actual, manual, and physical possession is shown by the testimony to have been in one of the other occupants of the Nash sedan in which the appellant was riding, whose name was Fitzgerald.

[2, 3] It appears that upon the submission of the cause to the court for decision the court remarked that he would prefer to omit from consideration, and had done so as far as it was humanly possible to do so, the testimony of the witness Scrudder. Upon this statement the appellant urges in effect that the transcript must be read and the cause considered as though the testimony of Scrudder were eliminated therefrom. This conclusion, however, does not follow. No motion to strike out the testimony of the witness Scrudder was made, nor is there anything in the record which indicates the improbability or untruthfulness of any portion of Scrudder's testimony. While this court is not called upon to express any opinion as to the character of the witness known as "James F. Scrudder," it is due to him for us to state that we have carefully compared his testimony with the statement made by the appellant to the district attorney of the county of Stanislaus, and others, on the night of his arrest, and if the statement then and there made by the appellant is true, then and in that case the testimony of the witness Scrudder is likewise substantially correct. In other words, the statement made by the appellant corroborates the testimony of the witness Scrudder, and the testimony of the witness Scrudder corroborates the statement made by the appellant. We may here add that the witness Scrudder was only a feigned accomplice, and therefore his testimony is not subject to the limitations contained in section 1111 of the Penal Code. People v. Keseling, 35 Cal.App. 501, 170 P. 627. The testimony of the witness Scrudder and the statement of the appellant show that a number of persons, most of whom were defendants in the case of People v. Fitzgerald, supra, met in a restaurant in San Francisco; that two cars were used to convey the party to the town of Patterson, in the county of Stanislaus; that two packages of dynamite were car-

ried, one package in a car known as the "Chrysler," the other in a car known as the "sedan," in which the appellant was an occupant; that the sticks of dynamite were wrapped in newspapers; that the appellant carried upon his person and inside of his shirt certain fuses; that when the party in the Nash sedan reached a point near its intended destination in the county of Stanislaus, and being stopped by certain officers, disposed of both dynamite and the fuses; that the appellant himself disposed of the fuses that had been carried upon his person.

The only difference in the testimony between Scrudder and the appellant as to the dynamite carried in the Nash sedan is that Scrudder testified that the dynamite was personally carried by an occupant of the Nash sedan, named Fitzgerald. The testimony of Scrudder and also of the appellant is to the effect that the purpose of the trip to Stanislaus county was to get some "finks" (strike breakers).

After reading every word of the testimony in this case, we find that a fair summary thereof is contained in the brief of the respondent, which we here set forth, to wit:

On the evening of April 20, 1935, two investigators employed in the independent detective and patrol service, named Alfred B. Hughel and Sidney Lewis, respectively, were patroling the highway between the towns of Westley and Patterson in the county of Stanislaus, looking for a car bearing license No. 5J2930. The car, a Nash sedan, was found proceeding towards Patterson. They followed the car until it turned from the highway on a dirt road where it parked. The investigators proceeded on towards and into Patterson without stopping. On the way they observed a Chrysler coupé parked on the highway just north of the town. At Patterson Hughel notified certain other men, including Constable Kirk and Chief of Police Busingdal. This was approximately 11 o'clock at night. They then went back up the highway to where the Chrysler was still parked, stopped, and ordered the occupants out, and turned them over to the constable and the chief of police, who had followed them from Patterson. The investigators then got into their car and proceeded up the highway towards the side road where the Nash sedan had been parked. As they proceeded up the highway, they met the Nash sedan coming south towards the place where the Chrysler was parked. They passed the Nash, turned around, and followed it a ways and then drove up alongside and Hughel jumped to the running board of the Nash, and ordered the occupants to stop, which they did. Afterwards, under Hughel's direction, they proceeded to the Chrysler car where all of the men from the two cars were lined up. The defendant was in the Nash car occupying a front seat with one Marchant and Scrudder. Scrudder was driving, Marchant sat in the middle, and appellant sat on the right side of the car.

The cars were immediately searched while the men were lined up on the highway and a package containing five sticks of 40 per cent. strength dynamite and one stick of 60 per cent. strength dynamite were found in the Chrysler car.

A package, containing two lengths of fuses, one of which was capped, was also taken from the Chrysler car.

About 5 o'clock the following morning, right after daybreak, Hughel and Lewis returned to the place, and upon searching through the grass found on the side of the road where the Nash had been parked, which was the opposite side from that on which the Chrysler was parked, a package containing six sticks of dynamite and two rolls of fuse, one of them capped. The dynamite in this package also consisted of five sticks of 40 per cent. strength and one stick of 60 per cent. strength.

The men from the two cars were taken the same night of the arrest to the county jail, arriving there about 1 o'clock, where they were questioned by the district attorney. The defendant's statement is set forth in the transcript. In his statement he admitted that he was in the Nash car, and stated that that afternoon the men in the party met in San Francisco at a restaurant where they left their identification marks; that the dynamite was divided into two packages; that one package was placed in the Nash car; that defendant himself carried a length of fuse; that the purpose of the trip was to "get some finks" (strike breakers); that defendant was told to carry the fuse as they would "need it."

The testimony of Scrudder corroborates the testimony above paraphrased.

[4, 5] In view of sections 31 and 971 of the Penal Code, it is unnecessary for us to review the large number of cases from different jurisdictions contained in

the appellant's brief relating to the subject of possession. In consideration of the sections just referred to, the question of actual, manual possession of the dynamite, or whether any portion of the dynamite was actually upon the person of the appellant while riding in the Nash sedan over the highway in the county of Stanislaus, is wholly immaterial. It was not necessary to show that the dynamite was actually upon the person of any one of the occupants of the Nash sedan. It is sufficient to show that the dynamite was in the car, that the appellant had knowledge thereof (which the testimony sufficiently shows), and we may also add, the purpose of the trip was to get or intimidate certain strike breakers called "finks," as shown by the statement of the appellant as well as by the testimony of the witness Scrudder.

Section 31, supra, provides that all persons concerned in the commission of a crime, whether they directly commit the act constituting the offense, or aid and abet in its commission, etc., are principals and may be prosecuted as such.

Section 971, supra, specifies further that all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense or aid and abet in its commission, though not actually present, may be tried and punished as principals. Thus, the possession of the dynamite by any one of the occupants of the sedan car was the possession under the sections just referred to of all of the occupants, and every one of the occupants could be properly tried and punished as a principal.

The testimony to the effect that Fitzgerald had manual possession of the dynamite was equally sufficient to show, under the sections, that the appellant being one of the parties, and carrying the fuses, was likewise in possession of the dynamite, and if that dynamite was being conveyed for a reckless and malicious purpose, the appellant, under section 5 of Act 2433, supra, was committing the offense therein described as a felony.

What we have just stated is amply supported by the cases of People v. Kauffman, 152 Cal. 331, 92 P. 861; People v. Schmidt, 33 Cal.App. 426, 165 P. 555, and People v. Welch, 89 Cal.App. 18, 264 P. 324.

In People v. Fitzgerald, supra, the validity of section 6 of Act 2433, supra, was very carefully considered, and instead of setting forth herein what was there said, for the sake of brevity we content ourselves with reference to the clear and learned consideration given the validity of that section in the opinion in the Fitzgerald Case. We may add, however, that the application of the presumption mentioned in section 6 of the Act 2433, supra, is readily distinguishable from the presumption mentioned in the act to control and regulate possession, etc., of revolvers, approved June 13, 1923, Statutes 1923, p. 695. In section 6 the presumption is made applicable to the offense or offenses named in section 5 of the same act. In other words that where a person other than one entitled to have possession of dynamite for a legitimate purpose was found to be in possession thereof, the presumption prima facie followed that such possession was illegal and denominated reckless and malicious. In the act relating to the possession of firearms, the portion of the act involved did not relate to anything connected with the illegality of the possession of certain firearms without a license, but went farther, and to the effect that if one who had possession of a firearm without also being licensed to carry the same, and committed some offense, then the act purported to raise the presumption that the man intended to commit such particular offense.

The record shows that in the case of People v. Murguia, 6 Cal.(2d) 190, 57 P. (2d) 115, the court instructed the jury to the effect that if the defendant was carrying a weapon without a license, then it was presumed that he intended to commit the crime of murder with which he was charged.

Whether the trial court, in its consideration and determination of this cause, gave any consideration to the presumption mentioned in section 6 of Act 2433, supra, cannot be determined by the record, but the testimony which we have set forth herein in the abbreviated form shows the reckless and malicious possession and purpose with which the dynamite was being conveyed, without the necessity of applying any presumption. We may here add that the testimony also shows that the appellant was not one of the excepted persons mentioned in the act, but his occupation was that of a gang-boss on some pier in San Francisco.

One of the main contentions urged by the appellant for reversal is that section 5 of the Act 2433, supra, is void in that

the word "possession" does not appear in the title of the act, and, therefore, that the limitation of section 24 of article 4 of the Constitution applies. That section requires that every act should embrace but one subject which shall be expressed in the title, and if any subject is embraced in the act which is not expressed in the title, that portion is void.

[6] As said in Re Estate of Wellings, 192 Cal. 506, 221 P. 628, 634, and quoted with approval in the case of Fitzgerald, supra: "It is now well settled that the constitutional provision requiring the subjects of the act to be expressed in its title must be liberally construed, and that all that is required to be contained therein in order to meet the constitutional requirement is a reasonably intelligent reference to the subject to which the legislation is to be addressed." Irrespective of what language may have been used in the case of People v. Murguia (Cal.App.) 42 P.(2d) 325, the decision in the case of People v. Fitzgerald (hearing denied by the Supreme Court), where a parallel question was considered and determined, must be given binding force and effect, even though the Supreme Court in deciding the case of People v. Murguia, supra, did not mention the specific subject of the omission alleged to be in the title of the act there under consideration.

In addition to what appears in the opinion in the Fitzgerald case, supra, we may further consider the title of Act 2433. It reads: "An act to protect life and property against the careless and malicious use or handling of dynamite and other explosives." In the attempt to provide for the protection of life and property the Legislature specifies a number of specific acts, some to be performed, some to be prohibited in order to accomplish such purpose. Section 1 requires a record of sales; section 2 sets forth what the record must show; section 3 makes such record or journal open to inspection; section 4 relates to forfeitures and punishment; section 5 relates to possession of the explosives in certain places and localities; section 6 applies a presumption prima facie to others than excepted persons; section 7 relates to punishment for unlawful possession; section 8 prohibits deposits of explosives; section 9 takes up the subject of transportation of high explosives.

[7] That every one of the requirements and prohibitions contained in the different sections is calculated to protect life and property is beyond question. The purpose of the act, as shown by the title, is to protect life and property against the careless and malicious use or handling of dynamite. One question seems to us to answer definitely as to whether section 5, supra, comes within the purview of the title: Does the prohibition of the reckless and malicious possession of dynamite on the highways of the state tend to protect life and property? There can be but one answer to this question. While there may be a technical distinction between a very refined definition of the word "use" and the word "possession," it is certain that whether the one or the other term is used in the section, the whole intent and purpose of the Legislature is to protect life and property, and if section 5 answers the foregoing question affirmatively, as it does, we necessarily come to the conclusion that the prohibited purposes within section 5 of Act 2433, supra, are within the title and within the intention of the Legislature in its enactment to protect life and property.

[8] While possession may be said very properly not to necessarily include use and handling, on the other hand there can be no use and handling without possession. Therefore, in employing the terms "use" and "handling," the Legislature broadened the title sufficiently to include possession. It has been frequently held that the title to an act need not embrace a catalogue of all of its contents. Abeel v. Clark, 84 Cal. 226, 24 P. 383; Ex parte Hallawell, 155 Cal. 112, 99 P. 490.

[9] Likewise, it has been held that words giving a general scope to an act found in the title is not limited by particular or descriptive words used in the different sections thereof. See Hunt v. Manning, 24 Cal.App. 44, 140 P. 39.

[10] The general scope of the title of the act in this case, as we have said, shows that the purpose of the Legislature was to protect life and property.

[11] In construing section 24 of article 4 of the Constitution, it has been held that provisions which are logically germane to the title may be included therein. Evans v. Superior Court, 215 Cal. 58, 8 P.(2d) 467; Buelke v. Levenstadt, 190 Cal. 684, 214 P. 42; Robinson v. Kerrigan, 151 Cal. 40, 90 P. 129, 121 Am.St.Rep. 90, 12 Ann. Cas. 829.

There can be no question, as we have stated, that all of the required and prohibited acts set forth in the act of the Legislature, known as Act 2433, support the purpose of the Legislature to protect life and property, and we think legitimately come within the meaning and scope of the title used.

[12] Notwithstanding the contention of the appellant that the evidence is insufficient to establish guilt, it appears to us that the testimony set forth in the transcript establishes beyond all reasonable doubt the illegal and unlawful possession of dynamite on the part of the appellant, and that the trial court could not do otherwise than find the appellant guilty as charged.

[13] Likewise, we conclude that the proposition of the appellant that sections 5 and 6 of the Act 2433, supra, are unconstitutional, is untenable.

The order and judgment are affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



21 Cal.App.2d 11

McCLINTOCK v. ABEL.

Civ. 1840.

District Court of Appeal, Fourth District, California.

May 12, 1937.

Hearing Denied by Supreme Court July 9, 1937.

1. Elections ⇐141

Direct Primary Law contemplates only machinery for selection of candidates to be voted on in ensuing general election, and does not contemplate election of candidates to office (St.1917, p. 1363, § 28; St.1933, pp. 367, 2485, §§ 23, 28a).

2. Elections ⇐154(1)

Promptness in decision of contests between candidates for nomination is of prime importance, since officer charged with duty of having ballots printed for general election must know names of all candidates which are to appear on such ballots (St. 1917, p. 1363, § 28; St.1933, pp. 367, 2485, §§ 23, 28a).

3. Elections ⇐154(1)

Provisions of Direct Primary Law for contests apply only to contest between candidates for nomination for office, and do not apply to contest of election of candidate (St. 1917, p. 1363, § 28; St.1933, pp. 367, 2485, §§ 23, 28a).

4. Elections ⇐120

Constitutional provision for election of nonpartisan county officers receiving majority of votes at primary election transmutes primary election held for purpose of nominating candidates into general election of those nonpartisan officers receiving, in primary, majority of all votes cast for their respective offices (Const. art. 2, § 2¾).

5. Elections ⇐269

Contest of right to nonpartisan office of county supervisor of candidate declared elected in primary election *held* governed by provisions of Code of Civil Procedure for contest of election to office, including provisions fixing time for filing contest and for appealing from judgment thereon, not by provisions of Direct Primary Law for contests between candidates for nomination, where there was but the one office of county supervisor to be filled and but two candidates, whose names were on primary election ballot (Code Civ.Proc. § 939, as amended by St.1933, p. 306; § 1111, as amended by St.1935, p. 1458; §§ 1112–1127; §§ 1115, 1126; St.1917, p. 1363, § 28; St.1933, pp. 367, 2485, §§ 23, 28a; Const. art. 2, § 2¾).

6. Courts ⇐212

District Courts of Appeal have original appellate jurisdiction over election contests, and appellate jurisdiction of Supreme Court over such contests arises only after transfer to Supreme Court in manner provided by law (Const. art. 6, §§ 4, 4b).

7. Constitutional law ⇐56

Where Constitution fixes jurisdiction of a court, such jurisdiction cannot be changed by Legislature without authority from people in form of constitutional amendment.

8. Constitutional law ⇐56

Statutory provision for appeal in election contest to Supreme Court within 30 days after notice of entry of judgment *held* ineffective because violative of constitutional provision giving District Courts of Appeal original appellate jurisdiction over election contests, in that provision attempts to give Supreme Court original appellate jurisdiction over election contests (St.1907, p. 913; St.1909, p. 975; Code Civ.Proc. § 1126; Const. art. 6, §§ 4, 4b).

Appeal from Superior Court, Kern County; J. J. Trabucco, Judge.

Action by Leondard McClintock, contestant, against Stanley Abel, contestee, to try contestee's right to the office of Supervisor of Kern County. Judgment in favor of contestee, and contestant appeals.

Motion to dismiss appeal denied, and judgment reversed.

Hearing denied by Supreme Court; THOMPSON, J., dissents.

Matthew S. Platz, of Bakersfield, for appellant.

Harvey, Johnston & Baker, J. O. Reavis, Frederick E. Hoar, and Borton, Petrini & Conron, all of Bakersfield, for respondent.

MARKS, Justice.

This is an appeal from a judgment entered in favor of defendant in an action instituted to try his right to the office of supervisor of Kern county to which he had been declared elected in the primary election held in August, 1936.

Plaintiff and defendant were the only candidates for the office of supervisor whose names appeared on the ballot in the primary election. After the canvass of the returns by the board of supervisors, it appeared that defendant had received a majority of all the votes cast for that office. On September 8, 1936, a certificate of election was issued to him. On October 7, 1936, plaintiff filed his contest of election. Defendant filed a demurrer and answer on October 16, 1936. The demurrer was sustained without leave to amend on October 21, 1936. Judgment was rendered and entered and notice of entry of judgment given on the same day. Notice of appeal was given on December 19, 1936.

Defendant has moved to dismiss the appeal on the ground that the notice of appeal was filed after the time allowed by law. The motion to dismiss and the appeal on its merits were argued and submitted at the same time and are now before us for decision. As the same question is involved in each, we will consider the motion to dismiss with the appeal on its merits.

Plaintiff contends that the provisions of section 1111 (as amended by St.1935, p. 1458) and sections 1112 to 1127, inclusive, of the Code of Civil Procedure govern here. Defendant maintains that the provisions of sections 28 and 28a of the Direct Primary Law (Stats.1913, p. 1379, as amended, Stats. 1917, pp. 1341, 1363, and Stats.1933, p. 367, 2485) are controlling. If the position of plaintiff is correct the contest was filed and the appeal was taken in time. Sections 1115, 1126, Code Civ.Proc., Stats.1909, pp. 718 and 975. On the other hand, if we agree with defendant that the provisions of sections 28 and 28a of the Direct Primary Law are controlling, the contest was filed too late and the notice of appeal was given after the time for appeal had expired.

It is unnecessary for us to determine whether any or all of the provisions of section 28 of the Direct Primary Law were repealed by the later enactment of section 28a of that law. As the provisions of section 28a more nearly support the position of defendant than those of section 28, we will not particularly concern ourselves with that section except in so far as a general reference to it may be necessary.

The Direct Primary Law as originally enacted provided for the nomination of candidates for partisan and nonpartisan offices by direct vote of the electors. As the office of supervisor is a nonpartisan office we will only concern ourselves with that portion of the Direct Primary Law which relates to such offices. In the instant case there was but one office to be filled and but two candidates for that office whose names were on the primary election ballot. We will, therefore, confine ourselves to a consideration of such a situation, and anything we may say should not be construed as applying to any other.

[1] Section 23 of the Direct Primary Law of 1913 provided that in case one candidate received a majority of all of the votes cast in the primary for all candidates for such office, such majority candidate would be the only candidate for such office whose name would appear on the ballot at the ensuing general election. Except for amendments unimportant here, that rule has not been changed in the Direct Primary Law. Stats.1933, p. 367. It is clear that the purpose of the Direct Primary Law is to provide machinery for the selection of candidates to be voted for in the ensuing general election. To that extent, and in so far as it appears from that law itself and no other, an election held pursuant to its provisions is a primary and not a general election. The election of a candidate to office is not contemplated by that act.

On November 2, 1926, the people of the state adopted section 2¾ of article 2 of the Constitution which provides in part as follows: "Any candidate for a judicial, school, county, township, or other nonpartisan office who at a primary election shall receive votes on a majority of all the ballots cast for candidates for the office

for which such candidate seeks nomination, shall be elected to such office."

While the precise question we are considering is one of first impression, the cases of Kerr v. Russell, 209 Cal. 36, 285 P. 311, and DeWoody v. Belding, 210 Cal. 461, 292 P. 265, 266, are of considerable assistance in solving the problem.

In the Kerr Case the question involved was that of the election of the district attorney and a supervisor of Los Angeles county at the primary election held in August, 1928. Each was a majority candidate at the primary election and a certificate of election was issued to each. Neither name appeared on the ballot at the ensuing general election. The question involved was whether the primary election for the nomination of candidates became a general election for a candidate receiving a majority of all the votes cast for the office which he sought, under the then recent amendment to the Constitution (Section 2¾, art. 2), or whether he became a nominee and the only candidate whose name would appear on the general election ballot under the provisions of section 23 of the Primary Election Law. In deciding that question the Supreme Court said: "It has always been the policy of our law to preserve uniformity throughout the state as to the time for the election of elective county officers. Section 2¾ of article 2 of the Constitution preserves that uniformity, and provides for the election at the primary elections of nonpartisan county officers who receive votes on a majority of all the ballots cast for such officers. This is a general provision, is applicable throughout the state, and is self-executing. * * * Consequently said section 2¾ has operated since its adoption in November, 1926, so as to provide for the election of nonpartisan county officers of Los Angeles county at the primary election, and the names of such officers so elected were not in 1928 and are not required to be placed on the ballot at the succeeding general election."

In the case of DeWoody v. Belding, supra, much the same question was involved as to the election of a supervisor of Butte county at the August primary election. In arriving at the same conclusion as that reached in Kerr v. Russell, supra, the Supreme Court said: "He was, therefore, elected at said primary election, and, if he had lived, he would have been entitled to a certificate of election, and, upon qualifying, to succeed himself for the full term commencing January 5, 1931, and his name would not appear on the ballot at the forthcoming general election. In legal effect the primary election was a final election so far as the two candidates for said office were concerned. The death of Meeker on September 16th did not convert the primary election into a nominating election as to either candidate, and section 25 of the Direct Primary Law (St.1913, p. 1407 as amended) would have no application. That section contemplates a situation where no one of three or more candidates receives votes on a majority of all the ballots cast for candidates for the particular office. In such case there is no election, but the nomination only of the two receiving the highest number of votes. In other words, in the absence of an election under the new constitutional provision, two candidates are nominated for the office, and they are the 'candidates chosen at the primary election to go on the ballot for the succeeding general election.' * * * The result of the primary election in said supervisorial district of Butte county was therefore that Meeker was elected, Mahon was defeated, and neither was nominated, as contemplated by section 25 of the Direct Primary Law (St.1913, p. 1407 as amended). Meeker's right to the office to which he had been elected was inchoate."

[2] It is our conclusion that up to the time of the adoption of section 2¾ of article 2 of the Constitution, primary elections were held solely for the purpose of nominating candidates for offices and possessed none of the attributes of general elections. The election of officers at a primary election was not contemplated by the framers of the act or any of its amendments. Under the provisions of the Direct Primary Law as it now stands (disregarding the Constitution), no candidate can be elected to office at a primary election. The act sets up complete and comprehensive machinery for nominations but does not concern itself with elections. Sections 28 and 28a deal with contests between candidates for nomination and set up a summary procedure for judicial determination of such contests. In such cases promptness of decision is of prime importance, for the officer charged with the duty of having the ballots printed for the general election must know the names of all the candidates which are to appear on such ballots.

Section 28a of the Direct Primary Election Law concerns itself solely with such contests between candidates for nominations for offices. That section provides in

part as follows: "Any candidate at a primary election may contest the right of another candidate for the same office by filing an affidavit * * * in the office of the clerk of the superior court of the county in which he desires to contest the right of the candidate to such nomination."

It places the following limitations on the judgment to be rendered in a contest: "After the court has heard the proofs and allegations of the parties it must file its findings of fact and conclusions of law and immediately pronounce judgment either confirming or setting aside such nomination and decreeing contestant nominated."

[3-5] It would thus appear that the contests provided for the Direct Primary Law are between candidates for *nomination* for office only and do not contemplate the contest of the *election* of a candidate. The effect of section 2¾ of article 2 of the Constitution has been to transmute a primary election held for the purpose of nominating candidates, into a general election of those nonpartisan officers receiving in the primary a majority of all votes cast for their respective offices. Up to the present time the Legislature has not taken cognizance of this situation injected into primary elections by the constitutional amendment. The Direct Primary Law provides no machinery for the contest of the election of a majority candidate in the primary. It follows that the time limitations on instituting contests and taking appeals contained in section 28a of the Direct Primary Law apply only to a contest of a nomination in a primary election. They cannot apply to the instant case because defendant was declared elected, not merely nominated as a candidate for the office of supervisor of Kern county.

Section 1111 et seq. of the Code of Civil Procedure sets up legal machinery for the contest of an election to a public office. This chapter of the Code concerns itself with contests of *elections* and has nothing to do with the contest of a *nomination* in a primary election. As we are dealing with the contest of an election of an officer to a nonpartisan office the provisions of section 1111 et seq. of the Code of Civil Procedure are controlling here.

It is provided in section 1115 of the Code of Civil Procedure that a contest of election "must be filed within thirty days after the declaration of the result of the election by the body canvassing the returns thereof." That provision was complied with in the instant case. Section 1126 of the same code contains the following: "Either party, aggrieved by the judgment of the court, may appeal therefrom to the district court of appeal, as in other cases of appeal thereto from the superior court."

This appeal was properly taken within "sixty days from the entry of" the judgment. Section 939, Code Civ.Proc., as amended by St.1933, p. 306.

[6-8] Defendant raises one further question that requires consideration. He calls attention to the fact that there are two sections 1126 in the Code of Civil Procedure. The one from which we have quoted provides for appeals in election contests to the District Courts of Appeal within sixty days from the entry of judgment. Stats. 1909, p. 975. The other section 1126 provides for appeals in such cases to the Supreme Court within thirty days after notice of entry of judgment. Stats.1907, p. 913. Defendant urges that if this last section be given effect the notice of appeal in the instant case was filed too late and that the appeal should be dismissed. There is no merit in this contention. Section 4b of article 6 of the Constitution gives District Courts of Appeal appellate jurisdiction over election contests. The appellate jurisdiction of the Supreme Court over such cases arises only after transfer to that court in the manner provided by law. Section 4, article 6, Const. Where the Constitution fixes the jurisdiction of a court that jurisdiction cannot be changed by the Legislature without authority from the people in the form of a constitutional amendment. It follows that the provisions of the section 1126 of the Code of Civil Procedure which attempts to give the Supreme Court original appellate jurisdiction over election contests cannot be given effect here as they violate the plain provisions of the Constitution.

The motion to dismiss the appeal is denied. The judgment is reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

PEOPLE v. WAGNER.

Cr. 348.

District Court of Appeal, Fourth District, California.

May 18, 1937.

Hearing Denied by Supreme Court June 17, 1937.

1. Criminal law ⇐407(1)

Statements of deceased made in presence of defendant accused of homicide, that defendant shot deceased, *held* not admissible where defendant had immediately denied accusation and had asserted that he did not shoot deceased.

2. Criminal law ⇐535(2)

Evidence that .38 caliber ball was removed from deceased's body, that defendant accused of homicide owned .38 caliber revolver which was found in room adjoining that in which deceased was shot, that another bullet had entered wall of room, and that two .38 caliber shells were found stamped into mud outside door of house in which deceased was shot, sufficiently established corpus delicti to warrant admission of extrajudicial statements of defendant.

3. Homicide ⇐178(3)

Refusal to permit defendant accused of homicide to prove threats made against deceased by third persons a few days before killing *held* not error, in absence of evidence connecting third person with killing, where defendant was permitted to prove that third person and deceased had engaged in scuffle, that third person was armed with pickhandle, that deceased had the advantage in the scuffle, and that third person had threatened deceased.

4. Homicide ⇐234(10)

Defendant's admission that he pointed revolver at and shot deceased *held* to warrant manslaughter conviction, where admission was freely and voluntarily made while defendant was in possession of his faculties.

5. Homicide ⇐340(1)

Alleged minor procedural errors and minor errors in instructions did not warrant reversal of manslaughter conviction, where defendant freely and voluntarily and while in possession of his faculties admitted firing fatal shot.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Ernest Wagner was convicted of manslaughter, and he appeals from the judgment of conviction and an order denying his motion for new trial.

Judgment and order affirmed.

James L. King, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for the People.

MARKS, Justice.

Defendant was charged with the crime of murder. He was convicted of manslaughter and has appealed from the judgment and order denying his motion for new trial.

[1] Defendant urges that the trial court committed error in admitting in evidence, over his objections, statements made by deceased in the presence of defendant wherein deceased accused defendant of having shot him. Defendant immediately denied the accusations and asserted he had not shot deceased. Under a similar state of the record, this court said, in People v. Wignall, 125 Cal.App. 465, 13 P.(2d) 995, 998:

"Where a defendant denied his guilt, accusatory remarks made in his presence are not admissible for any purpose. People v. Lapara, 181 Cal. 66, 183 P. 545; People v. Goltra, 115 Cal.App. 539, 2 P.(2d) 35; People v. Ayhens, 16 Cal.App. 618, 117 P. 789. The testimony of the district attorney should not have been offered in evidence. People v. Teshara, 134 Cal. 542, 66 P. 798; People v. Goltra, supra."

[2] Defendant maintains that the corpus delicti was not established and, therefore, extrajudicial statements made by him were improperly admitted. Deceased was shot on the afternoon of November 21, 1936. The bullet entered the left side of his body about 3½ inches above the crest of the left hip bone. It ranged downward and backward piercing the intestine and spinal column. He died on the early morning of November 23, 1936, from peritonitis induced by the wound. A .38 caliber ball was removed from his body. Defendant owned a .38 caliber revolver which was found in a room adjoining that in which deceased was shot. In addition to the bullet in deceased's body, another had entered the wall of the room in which deceased was shot. Two .38 caliber shells were

found stamped into mud outside the door of the house where the crime had been committed. While there was no direct evidence of the presence or absence of powder burns on the body of deceased, two physicians testified that other than the bullet hole there were present no bruises, abrasions, or other marks. From this evidence, it might have been inferred there were no powder burns on deceased's body. Under this state of the record, the corpus delicti was sufficiently established to permit the introduction in evidence of the extrajudicial statements of defendant. People v. Bonilla, 114 Cal.App. 219, 299 P. 784; People v. Clark, 70 Cal.App. 531, 233 P. 980; People v. Selby, 198 Cal. 426, 245 P. 426.

[3] Defendant complains of rulings which he maintains deprived him of the opportunity of proving threats made against deceased by James McClune a few days before the killing. He was permitted to prove that McClune and deceased had engaged in a scuffle; that McClune was armed with a pickhandle; that deceased had the advantage in the difficulty; that McClune threatened deceased. There was no evidence connecting McClune with the commission of the crime. In making these rulings, the trial judge was more lenient to defendant than necessary under the established law of this state. People v. Mendez, 193 Cal. 39, 223 P. 65.

[4, 5] Defendant next contends that the evidence is insufficient to support the verdict and judgment. On two occasions following the death of deceased, defendant freely and voluntarily admitted that he pointed the revolver at deceased and shot him. The only explanation which he offered was that he was drunk and did not know why he fired the two shots from his gun.

Defendant became a witness in his own behalf at the trial. He neither denied making these statements nor shooting deceased. He merely contented himself with testifying that for a period of about three weeks commencing a short time before the shooting he was so drunk he had no recollection of anything that had happened. There was ample evidence disproving any such state of intoxication.

Defendant complains of two instructions given by the trial court. If we assume that his position is correct, still it would furnish no good ground for reversal. Defendant freely and voluntarily admitted firing the fatal shot. His statements were taken down by a court reporter and read into the record. We have studied the entire record and find nothing to cause us to entertain the slightest doubt of the truth of these confessions nor to question the fact that they were fairly obtained and freely given while defendant was in possession of his faculties. Under such circumstances, minor procedural errors and minor errors in instructions, if any, could not be held to have resulted in a miscarriage of justice. Defendant stands convicted by his own confessions and cannot complain because the jury, the trial judge, and this court have accepted his own statements at their face value.

The judgment and the order denying the motion for new trial are affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.



21 Cal.App.2d 44

VON NEINDORFF v. SCHALLOCK et al.

Civ. 1853.

District Court of Appeal, Fourth District, California.

May 14, 1937.

1. Quieting title ⇐10(1)

In action to quiet title, plaintiff must rely on strength of his own title rather than on weakness of opponent's.

2. Quieting title ⇐16

Grantee under option to purchase land from holder of trustee's deed by foreclosure of trust deed, where both option and trust deed expressly excepted a certain disputed strip of property, *held* not proper party to maintain action to quiet title to disputed strip.

3. Adverse possession ⇐43(4)

Claimant of land by adverse possession who relies on possession of previous holder must show privity of estate with previous holder, and cannot tack to the time of his possession that of a previous holder where land claimed adversely was not included within boundaries of conveyance received from previous holder.

4. Adverse possession ⇐43(4)

Claimant of land by adverse possession could not tack on possession of previous holder in absence of privity with previous holder, especially where land was particularly excepted from conveyance of adjoining land by predecessor to claimant, notwithstanding stipulation to effect that parties intended that the land should pass.

5. Adverse possession ⇐57

In action to quiet title by claimant through adverse possession relying on possession of previous holder, evidence that conveyance of adjoining land by previous holder to claimant expressly excepted disputed strip although parties intended to include it *held* insufficient to establish title in claimant, in absence of reformation of deed.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action to quiet title by Margaret M. Von Neindorff against A. F. Schallock and others. From a judgment for plaintiff, the defendants Lester W. Lamkin and Helen Porter Lamkin appeal.

Reversed and remanded.

Bradley & Bradley, of Visalia, and Max B. Jamison, of Porterville, for appellants.

Farnsworth, Burke, & Maddox and James K. Abercrombie, all of Visalia, for respondent.

BARNARD, Presiding Justice.

This is an action to quiet title. The first count of the complaint sets forth all of the facts relied upon as showing that all of the defendants are estopped from disputing the plaintiff's title to the land in question. The second count is in the ordinary form of a quiet title action. Judgment was entered in favor of the plaintiff, and the defendants Lamkin have appealed.

The real property involved in this action is a small piece or strip of land situated within the exterior boundaries of a 24½-acre orange grove, which was owned by the defendants Schallock. The legal title to this small piece stood in the name of the Magnolia Water Company, which is apparently a defunct corporation. The Schallocks built a house on the small strip in question, although about 5 feet of the house on one side and 9 feet on another side extended over upon the land to which they had title. They occupied the entire property, including this strip, for some 14 years and paid taxes on both parcels for more than the required 5-year period. In April, 1932, the respondent bought the orange grove from the Schallocks, who represented that the house was a part of and went with the place. The deed to the respondent contained several reservations not material here, and also contained a clause excepting therefrom the strip of land here in question. It appears that neither the Schallocks nor the respondent knew that this exception was in the deed and it was stipulated at the trial that it was the intention of all of them that the deed should cover all of the land within the exterior boundaries of the 24½-acre tract.

The Schallocks received all of the consideration agreed upon, consisting of a certain amount of cash, certain personal property, two promissory notes which were later reduced to judgment and the respondent assumed and agreed to pay a trust deed which was then a lien on that part of the property to which the Schallocks had title. The appellant Helen Lamkin was the beneficiary of this trust deed, the description of which particularly excepted the strip here in question. The respondent took possession of all of the property in April, 1932, and personally occupied the same, including the house, from October, 1932, until about the end of September, 1933. At that time the appellants moved into the house, having received a trustee's deed after a foreclosure of the trust deed. This trustee's deed, like the trust deed, covered only that part of the property which had stood in the name of the Schallocks and excepted the property herein in question. About October, 1933, the appellants discovered that they did not have a record title to the strip of land on which most of the house was built. Thereupon they obtained a quitclaim deed from the Schallocks and a purported deed from certain stockholders of the Magnolia Water Company. The appellants had given to one Richardson an option to purchase the real property they had acquired by the sale under the trust deed. This option was assigned to the respondent who assigned it to one Konda. This option did not cover the strip of land involved in this action, but covered only the property acquired under the sale under the trust deed. Konda later exercised that option which led to another action and another appeal, Konda v. Lamkin (Cal.App.) 66 P.(2d) 164, and he has never asserted any claim to the property here in dispute.

The main ground of appeal is that certain findings to the effect that the respondent is the owner in fee of the strip of land here involved are not supported by the evidence. It is further argued that if the respondent ever had any interest in this strip of land, she was divested of the same by the sale under the trust deed, that if she acquired any interest in this property under the option given by the appellants, she lost the same when she assigned that instrument to Konda, and that Konda alone is the proper party to bring any such action as this. The respondent argues, on the other hand, that the appellants acquired no interest in the property in question through the foreclosure of the trust deed, that they acquired no interest through the quitclaim deed from the Schallocks since all of the defendants are estopped from disputing that all rights owned by the Schallocks had passed to the respondent, and that the deed from the Magnolia Water Company was void and ineffective for several reasons.

[1, 2] There may be considerable merit in the contention that the appellants have acquired no interest in the property involved in this action and we may assume, for the purposes of this decision, that such is the fact. It is well settled, however, that in such an action as this, a plaintiff must rely upon the strength of his own title and not upon any weakness in his opponent's title. Under the facts shown by the evidence, and found by the court, it must be taken that the respondent was not divested of any interest she might have had in this particular property by the sale under the trust deed, and that any such interest was not affected by the option given by the appellants and which later passed to Konda. Both the trust deed and this option particularly excepted the property here in question from the property covered. It follows that Konda was not the proper party to maintain such an action as this.

The claim of the respondent must rest upon adverse possession. Since she was only in possession of the property for about 16 months, that claim must rest largely upon the possession of her predecessors, the Schallocks. While the possession of the Schallocks would seem to have been sufficient to have established their title under the rules of adverse possession since they occupied the property for some 14 years, farmed the land all around the property in question, built a substantial house on that property, and paid all taxes assessed thereon for more than 5 years, no action was ever taken by them to perfect of record such a title.

[3-5] Assuming that the respondent was otherwise entitled to rely upon the possession of her predecessors, in connection with her own, a well-established rule prevents her from taking advantage of that right under the facts as they now appear. The established rule in this state is that a claimant of land by adverse possession, who must rely on the possession of a previous holder, must show a privity of estate between himself and the previous holder, and cannot tack to the time of his possession that of a previous holder where the land claimed adversely was not included within the boundaries of the conveyance he received from such previous holder. City and County of San Francisco v. Fulde, 37 Cal. 349, 99 Am.Dec. 278; Allen v. McKay & Co., 120 Cal. 332, 52 P. 828; Messer v. Hibernia Sav., etc., Society, 149 Cal. 122, 84 P. 835; Saner v. Knight, 86 Cal.App. 347, 260 P. 942. The reason for the rule is obvious, as otherwise a person receiving a conveyance of a part of lands occupied by a predecessor might use the possession of that predecessor of another part of the land to defeat the rights of that predecessor with respect to that part of the land which he intended to keep for himself. The rule is particularly appropriate in a case such as this where the land, the predecessor's possession of which is relied upon, was particularly excepted from the conveyance made by the predecessor. While in this case it was stipulated that it was the intention of all parties thereto that the land here in question should pass to the respondent by the deed given them by the Schallocks, the fact remains that the deed failed to carry out this intention and expressly excluded this property from its operation. The respondent should, by appropriate pleadings, have sought reformation of this deed in order to carry out the intention of the parties and in the same action have sought to quiet her title. Until that deed is reformed she is in no position to avail herself of the possession of her predecessors and the evidence is not sufficient to sustain the finding that she is the owner of the property in fee. She should, if so advised, be permitted to so amend her complaint as to ask for a reformation of her deed and the quieting of the title conveyed by the deed as reformed.

For the reasons given, the judgment is reversed and the cause remanded for further proceedings.

We concur: MARKS, J.; JENNINGS, J.



20 Cal.App.2d 500

MALLETT v. SOUTHERN PAC. CO. et al.

Civ. 5674.

District Court of Appeal, Third District, California.

April 23, 1937.

Rehearing Denied by Supreme Court June 21, 1937.

1. Evidence ⇐7

It is common knowledge that a black stationary object against the dark background of a highway is difficult to see on a dark night even with aid of standard headlights, notwithstanding theory that rays of light from standard headlights of an automobile which are required by Vehicle Code within specified limited distances are presumed to disclose to view an object (St. 1935, p. 201, § 618 et seq.).

2. Railroads ⇐347(3)

In action by motorist for injuries sustained as result of collision at night with car standing on railroad crossing, color of object on highway on a dark night and presence of other objects which may deepen the shadows in that vicinity must be considered in determining how clearly it may be seen by means of standard automobile headlights (St.1935, p. 201, § 618 et seq.).

3. Negligence ⇐136(26)

Ordinarily, question of contributory negligence is for jury.

4. Railroads ⇐350(26)

Contributory negligence of motorist who drove into low, dark, northbound gondola car, standing on unlighted town crossing at night, in reliance on belief that wigwag signal system which had ceased operating, operated until trains had cleared crossing, while in fact system operated for southbound trains until crossing was cleared but ceased to operate for northbound train when last car passed point thirty-one feet south of crossing, where last car had passed point at which signal system stopped, *held* for jury (St.1935, p. 201, § 618 et seq.).

5. Railroads ⇐324(1)

Railroad crossing is itself warning of danger from either moving or stationary cars.

6. Railroads ⇐304

Railroad will not ordinarily be held liable for negligence merely because crossing is temporarily blockaded by cars in the nighttime, or in a dense fog, without furnishing lights or a watchman to warn travelers on highway of danger, provided such conduct is not in conflict with an ordinance or a statute to the contrary.

7. Railroads ⇐307(3)

Railroad which maintains automatic wigwag signal system at crossing will be held liable for injuries motorist sustains in collision with stationary cars as result of defect in system, regardless of whether system was designed to warn travelers of approach of trains rather than of danger from stationary cars.

8. Railroads ⇐304

Presence of stationary train across public highway is ordinarily sufficient warning of danger to traveler who sees it, or by exercise of ordinary care will be presumed to have seen it.

9. Railroads ⇐307(3)

Where train standing across public highway is not observed by traveler through no fault of his own and traveler is injured by relying upon and reasonably acting in compliance with signals of system known by railroad to be defective, railroad is liable to traveler.

10. Railroads ⇐307(7)

Where railroad maintains crossing signals even though law does not require signals to be installed, public has right to rely on exercise of reasonable care by railroad to keep signals in good repair and in efficient working condition.

11. Railroads ⇐348(3)

In action by motorist who drove into northbound gondola car, standing on unlighted town crossing at night, in reliance on belief that wigwag signal system which had ceased operating, operated until trains had cleared crossing while in fact system operated for southbound train until crossing was cleared, but ceased to operate for northbound train when last car passed point thirty-one feet south of crossing, evidence *held* not to show that wigwag signal system was installed at crossing in accordance with

approved rules of Railroad Commission so as to exempt railroad from negligence on account of any defect in the system which might exist.

12. Railroads ⇐350(5)

In action by motorist who drove into northbound gondola car, standing on unlighted town crossing at night, in reliance on belief that wigwag system which had ceased operating, operated until train had cleared crossing, railroad's negligence as regards maintenance of system which operated for southbound trains until crossing was cleared but ceased to operate for northbound train when last car passed point thirty-one feet south of crossing which allegedly lured motorist into danger *held* for jury (St.1935, p. 201, § 618 et seq.).

13. Railroads ⇐344(3)

In action by motorist who drove into gondola car, standing on unlighted town crossing at night, complaint *held* to adequately allege a defect in wigwag signal system by which system operated for southbound train until crossing was cleared but ceased to operate for northbound train when last car passed point thirty-one feet south of crossing.

14. Appeal and error ⇐977(3)
New trial ⇐6

Grant of new trial rests largely in trial judge's discretion, which is conclusive unless clearly abused.

15. Appeal and error ⇐1015(2)

Where there is substantial conflict of evidence in affidavits presented on motion for new trial for newly discovered evidence, trial court's ruling will not be disturbed.

16. New trial ⇐151

In action by motorist who drove into gondola car, refusing railroad's motion for new trial on ground of newly discovered evidence that motorist was intoxicated at time of accident *held* not error where evidence contained in affidavits presented on motion was conflicting, and there was abundance of evidence from which trial court was warranted in determining that motorist was not intoxicated.

Appeal from Superior Court, Tehama County; H. S. Gans, Judge.

Action by Nora Mallett against the Southern Pacific Company and others. From a judgment against it, the named defendant appeals.

Affirmed.

Prior opinion, 65 P.(2d) 93.

George R. Freeman, of Willows, and R. C. Colombe, of Red Bluff, for appellant.

Carter & Barrett, of Redding, and Clair Engle, of Red Bluff (Daniel S. Carlton, of Redding, of counsel), for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

On rehearing of this cause we are satisfied the original opinion correctly determined the issues on appeal. With certain modifications, we have therefore adopted it as the opinion of this court.

The Southern Pacific Company appealed from a judgment of $8,259.25, which was rendered against it in a railroad crossing casualty which occurred in the town of Corning. The plaintiff was returning in the nighttime to her home from a restaurant which she conducted on the opposite side of the track. The crossing was unlighted and dark. Four parallel railroad tracks occupying a space of about 80 feet in width extend north and south through the town of Corning. A short distance south of the depot, Solano street crosses the railroad tracks at a right angle. The street is 60 feet in width and is paved. The railroad bed is elevated slightly above the level of the street. From a point 120 feet west of the railroad right of way, Solano street ascends to the level of the tracks at a grade of from 1¼ per cent. to 2.91 per cent., the steepest portion being adjacent to the nearest rail. The railroad bed is approximately level. Approaching from the west, the first track to be reached is a side track called the house track. Twenty feet easterly from that side track is the main track. Beyond the main track there are two other tracks. These tracks extend parallel through the town. An automatic wigwag system was maintained at the Solano street crossing. The device is located easterly of the main track and about 6 feet southerly of the south line of Solano street. It consists of a red electric lamp which continues to swing and an alarm bell which continues to ring while a railway train occupies the track within the zone in which it operates. This automatic wigwag system does not operate the same with respect to both north and southbound trains. It is so arranged that when a train which is traveling south reaches a point 1,700 feet north

of the crossing, the red light begins to swing and the bell begins to ring. They continue to operate until the last car has passed a point 17 feet south of the Solano street crossing. But when a northbound train reaches a point 1,350 feet south of that crossing the wigwag begins to operate, but the lamp ceases to swing, and the bell ceases to ring when the last car passes a point 31 feet south of the Solano street crossing. The plaintiff was not aware of that difference in the operation of the wigwag system with respect to north and southbound trains. She was familiar with that crossing, having passed over the tracks at that point almost daily for more than two years. She believed the wigwag system operated uniformly so that the lamp would continue to swing and the bell would continue to ring until the last car of either a north or a southbound train passed the Solano street crossing. The defendant's yard foreman testified that the wigwag was supposed to continue to operate until the train passed beyond the crossing. The plaintiff was deceived by that lack of uniform operation of the wigwag system.

March 17, 1934, at 4 o'clock in the morning, the plaintiff left her home east of the railway station and drove in her Ford coupé to her restaurant west of the railroad tracks in the town of Corning, to begin preparations for breakfast. Having placed a roast in the oven and having completed preparations for breakfast, she started to return to her home to procure her daughter to assist her in the restaurant. It was a dark night. The railroad crossing was not lighted. The nearest electric light was located at the hotel corner on Solano street 160 feet from the crossing. The plaintiff was alone in her automobile. It was in good mechanical condition. The headlights were burning. About the time she started to return to her home, a freight train arrived on the main track from the south. It consisted of an engine and tender, three box cars, a low gravel gondola car, and a caboose. The train stopped at the station so that the gondola car completely blocked the Solano street crossing. The caboose stood immediately south of the crossing, but it had passed the point at which the wigwag ceased to operate. The red lamp was not swinging and the bell had ceased to ring. There were lights in the caboose and a green light was attached to the side near its rear end, but these lights were evidently hidden from view, for the plaintiff testified that she stopped, looked, and listened just before she reached the nearest track and that she saw no train or lights and she heard no bell or the sound of a moving train. She said there were stationary box cars on the westerly side track both north and south of the crossing. It is reasonable to assume the box cars south of the crossing may have obscured her view of the caboose and of the lights which it displayed. These box cars on the house track on either side of the crossing may also have helped to render it more difficult for the plaintiff to see the low, dark gondola car which blocked the crossing on the main track. The gondola car stood only 7½ feet in height. The sides extended downward to a point within about 3 feet of the track. Beneath its box the bed extends downward in a V-shape to within 14 inches of the ground. This extension is called a dump. An iron lattice extends from the bottom of the gondola box on either side to within 14 inches of the ground.

As the plaintiff approached the track, she observed the box cars on the nearest track on either side of the crossing, but she failed to see the gondola car which blocked the crossing on the main track. She was not expecting a train to arrive at that time in the morning. She neither heard nor saw the train on the main track. She stopped her automobile just as she reached the first track, about 20 feet from the main track. She looked for the red wigwag light but did not see it. She listened for the electric bell and heard none. It is conceded the lamp was not then swinging and the bell had ceased to ring. She then threw in the clutch of her machine and proceeded on her way over the crossing, when suddenly she saw the gleam of the wheels of the gondola car as her lights shone upon them. She immediately threw out the clutch and applied the brakes, but was unable to stop her machine in time to avoid a collision. She swerved to the left, but struck the gondola car with great force, wedging her automobile beneath it. She received serious personal injuries as a result of the accident, and was taken in a senseless condition into the railway station, where a physician soon arrived to attend her. This suit for damages was subsequently instituted. The cause was tried with a jury. A verdict was returned in her favor. Judgment was rendered accordingly. From that judgment, the defendant has appealed.

The appellant contends that the evidence fails to support the implied findings of the

jury and judgment to the effect that it was guilty of negligence in blocking the railroad crossing; and asserts that the evidence affirmatively shows the plaintiff was guilty of contributory negligence, and that the court erred in refusing to grant the defendant another trial on the ground of newly-discovered evidence to the effect that plaintiff was intoxicated at the time of the accident.

[1-4] Under the circumstances of this case, the question regarding the alleged contributory negligence of the plaintiff was a problem for the determination of the jury, with which we may not interfere on this appeal. It was a dark night. The crossing was unlighted. She had neither seen nor heard the arrival of the train. She did not expect a train at that time of the night. The wigwag system had ceased to operate before she arrived at the crossing. The train was stationary, with the gondola car blocking the crossing. She was given no warning of its presence either by means of lights or otherwise. Box cars stood on the house track on either side of the crossing as she approached, concealing her view of the lighted caboose which stood south of the crossing on the main track. These box cars on the side track, between which it was necessary for her to pass before reaching the main track, undoubtedly increased the density of the shadows and rendered it more difficult for her to see the low, dark gondola car which blocked the crossing on the main track. She stopped her machine at the side track, 20 feet or more from the main track, where she looked and listened for a train and for the wigwag bell. She failed to see the gondola car, and she heard no bell. Assuming that the crossing was clear, she threw in the clutch of her automobile and proceeded to cross the tracks. In spite of the theory that the rays of light from the standard headlights of an automobile which are required by the provisions of the Vehicle Code of California (St. 1935, p. 201, § 618 et seq.), within specified limited distances are presumed to disclose to view an object, it is common knowledge that a black stationary object against the dark background of a highway is difficult to see on a dark night, even with the aid of standard headlights. Obviously, the color of an object on the highway on a dark night, and the presence of other objects which may deepen the shadows in that vicinity, must be considered in determining how clearly it may be seen by means of standard automobile headlights. For the reason that standard headlights of an automobile do not clearly illuminate the dark surface of a highway, the motor vehicle department paints a white stripe in the center thereof. In the case of Los Angeles & Salt Lake R. Co. v. Lytle, 56 Nev. 192, 47 P.(2d) 934, 938, 52 P.(2d) 464, which involved a collision in the nighttime between an automobile and a stationary gondola car under circumstances somewhat similar to this case, the court said:

"The extent to which a black surface will absorb the light of an automobile is known to every motorist."

The plaintiff in this case failed to see the gondola car. She relied on the ringing of the wigwag bell to warn her of the presence of a train, and assumed that the silence of the bell was an invitation for her to cross the tracks. She was led to believe they were then unobstructed. Her machine was well under way, and she was close to the gondola car before she observed the flash of her lights on the steel of the gondola wheels. She immediately applied her brakes and swerved sharply to her left, but was unable to avoid the collision. There is evidence of reasonable prudence on her part in attempting to cross the tracks, and there is no evidence of carelessness except the fact that she failed to see the gondola car which blocked the crossing. Her failure to observe this low, dark car against a black background at an unlighted crossing may be reasonably accounted for. Ordinarily, the question of contributory negligence is a problem for the determination of a jury. Under the circumstances of this case, we are of the opinion this court may not interfere with the implied finding of the jury that the plaintiff was not guilty of contributory negligence, even though we may concede that reasonable minds might differ regarding that question.

We are also of the opinion the evidence adequately supports the implied finding of the jury that the defendant was guilty of negligence which proximately caused the injuries sustained by the plaintiff, by maintaining at the Corning railroad crossing a defective electric wigwag system which did not operate uniformly with regard to both north and southbound trains, and which variance and silence of the wigwag bell deceived the plaintiff and led her to believe the crossing was unobstructed.

The plaintiff lived near the railway station and was familiar with the Solano

street crossing. She had crossed the tracks at that street almost daily for more than two years. She had frequently observed the operation of the wigwag system, and believed that it continued to operate until the Solano street crossing had been passed by the last car of either a north or a southbound train. She did not know that the electric system was installed so that the wigwag ceased to operate when the last car of a northbound train passed a point 31 feet southerly of the Solano street crossing. She did not know that it was possible for the wigwag system to cease operating while a northbound train actually blocked the crossing. The railroad company was aware of that fact. It was evidently deliberately installed in that defective manner, and therefore became a trap which lured the plaintiff to attempt to cross the tracks because of the silence of the wigwag bell.

There appears to be no good reason for maintaining a system by means of which a wigwag light and bell continue to operate until a southbound train has passed the station and the Solano street crossing, and yet which fails to operate for a northbound train while that crossing is still blocked by the train. It appears that lack of uniformity in the operation of the wigwag system is exactly what lured the plaintiff into danger, and we are of the opinion that defect in the electric wigwag system constitutes actionable negligence under the circumstances of this case.

[5, 6] The appellant asserts that the alleged defect in the wigwag system does not constitute negligence, for the reason that a railroad crossing is itself a warning of the presence of stationary cars and that the wigwag system is merely intended to give warning to travelers on the highway of the approach of trains. In support of these contentions the appellant cites the case of Dunlap v. Pacific Electric Railway Co., 12 Cal.App.(2d) 473, 55 P.(2d) 894, 895.

It is true that a railroad track is itself ordinarily a warning of danger at the crossing from either moving or stationary cars. Common knowledge of the movements of trains will usually charge travelers on the highway with the information that they are likely to encounter railway trains in attempting to cross the tracks. Koster v. Southern Pacific Company, 207 Cal. 753, 279 P. 788. A railroad company will not ordinarily be held liable for negligence merely because a crossing is temporarily blockaded by cars in the nighttime or in a dense fog, without furnishing lights or a watchman to warn travelers on the highway of the danger, provided such conduct is not in conflict with an ordinance or a statute to the contrary. Dunlap v. Pacific Electric Railway Co., supra; Baldwin v. Pacific Electric Railway Co., 208 Cal. 364, 281 P. 380. The Dunlap Case, upon which the appellant relies, cites with approval the case of Mabray v. Union Pac. R. Co. (D. C.) 5 F.Supp. 397, and states:

"It was held that a railroad company has a right to occupy a crossing in the conduct and operation of its business, and that such obstruction is in itself notice of danger, so that the railroad company is not bound to give any further warning; and that, after a train has reached a crossing, the duty of a flagman ends as to that train, since then the train itself is a sufficient warning."

It is further said in the Dunlap Case:

"No question of the giving of a warning of the approaching train is here involved, because at the time of the accident the engine had passed the crossing and was several hundred feet north thereof. 'All crossing signals are intended to protect the traveler against approaching trains and have been so regarded by our courts.' "

The preceding language was used in the Dunlap Case in affirming a judgment which was rendered against the plaintiff. However, it does not appear in that case that the appellant ran her automobile into a stationary train which was blockading a railroad crossing, relying upon the ringing of an automatic bell to warn her of an obstructed condition of the crossing, or that she was deceived by the silence of the bell into believing that the crossing was unobstructed. It does appear in the Dunlap Case that there was an automatic wigwag signal which was maintained at the crossing, and that "at no time did he [the driver] see any lights or hear any wigwag working." But it neither appears in that case that the driver was deceived by the failure of the automatic device to operate in a uniform manner, nor that he relied upon that signal as a warning. The Dunlap Case should be distinguished from the present case in that regard.

Likewise it was said in the Lytle Case, supra, regarding the rule which ordinarily exempts a railroad company from liability for negligence resulting from the blocking of a crossing without furnishing lights or

a watchman to warn travelers on the highway of the danger of stationary cars:

"A railroad company, in the absence of a statute requiring lights or other precautions, may not be chargeable with actionable negligence merely because its train is at rest on a crossing at a public highway, or in motion, and is run into by an auto traveling on the highway. Certainly it cannot be so chargeable if the accident happens in the daytime, nor in the nighttime on account of darkness alone."

However in sustaining the judgment in the last-mentioned case for injuries sustained by the plaintiff in colliding with a stationary gondola car which blocked a highway crossing in the nighttime in a dark place, the court further said:

"In the daytime the car itself would have been sufficient warning to travelers on the highway that the crossing was blocked, but under the existing condition the placing of it on the crossing and leaving it without taking adequate precautions to warn approaching motorists of the danger, amounted to negligence. * * *

"The average automobilist, when he encounters fog or smoke obscuring his way, instinctively acts with caution. Whereas an obstruction in his road under such conditions that the lights of his car cannot reveal it may become a trap despite his vigilance. The extent to which a black surface will absorb the light of an automobile is known to every motorist."

The language of the last paragraph is applicable to the present case. Moreover the plaintiff in this case was lured into attempting to cross the railroad tracks because of the silence of the wigwag bell.

[7-10] Whatever may be the purpose of maintaining an automatic wigwag signal at a railroad crossing, even though it be intended to merely warn travelers of the approach of trains, common justice demands that it shall be so constructed and maintained that it will not lure travelers on the highway into danger. It follows that a company which does maintain such a defective system will be held liable for injuries sustained as the result of those imperfections, regardless of whether the system was designed to warn travelers of the approach of trains rather than to inform them of the danger from stationary cars which block the crossings. It is true that ordinarily the presence of a train which is stationary across a public highway is a sufficient warning of danger to a traveler who sees it, or who by the exercise of ordinary care will be presumed to have seen it. But if, through no fault of the traveler, the train is not observed, and he is injured by relying upon and reasonably acting in compliance with the signals of a system known by the company to be defective, the company will be liable therefor. When railroad crossing signals are maintained by a company, even though the law does not require them to be installed, the public has a right to rely upon the exercise of reasonable care on the part of the railroad company, to keep them in good repair and in efficient working condition. Wyseur v. Davis, 58 Cal.App. 598, 209 P. 213; 52 C. J. 201, § 1791.

In the authority last cited it is said:

"If signals are provided, although not required by statute, the public has the right to rely thereon, and the company must use reasonable care to keep them in good condition and in working order, or to give notice that they are not operating, since if such a signal is misunderstood it is a menace."

This case, which is dependent upon the plaintiff's reliance upon what may be deemed to be a defective automatic signal system, should be distinguished from those cases upon which the appellant relies in which the complainants were injured through their own contributory negligence by colliding with railroad cars which blocked a crossing, merely because the companies were not required to furnish special lights or watchmen to warn travelers of the danger at the crossings. In the case of Louisville & N. R. Co. v. Mahoney, 220 Ky. 30, 294 S.W. 777, 779, it is said in that regard:

"Possibly the light in the wigwag signal was not intended to give light to a traveler upon the highway so that he could see a train upon the track, but it was intended to give a warning signal to travelers upon the highway that the crossing was then occupied by a train or was about to be occupied by a train then approaching, and to warn the approaching traveler of the danger of attempting to pass over the crossing, and a traveler upon the highway, who was acquainted with the fact that a wigwag signal bell and light was regularly maintained at that crossing, had a right to rely upon the efficiency of that signal to warn him of the approach of the train to the crossing and of the train upon the crossing, when he could not see and know

of the presence of the train at or about the crossing."

[11, 12] The appellant cites the case of Atchison, Topeka & Santa Fe Ry. Co. v. Scarlett, 57 S.Ct. 541, 542, 81 L.Ed. 395, in support of its contention that the wigwag system which was installed at the crossing in Corning was in accordance with the approved rules of the Railroad Commission and therefore exempts the railroad company from negligence on account of any defect in the system which may exist. We are of the opinion the Scarlett Case is not in point for the reasons that it involves a railroad accident coming within the interstate commerce rules including the doctrine of "assumption of risk" on the part of the injured employee because of his knowledge of the fact that the device through which his injuries were received had been used in that condition for a long period of time [Myers v. Southern Pacific Company, 14 Cal.App.(2d) 287, 294, 58 P.(2d) 387], and that he continued in his employment notwithstanding that fact. Scarlett was a brakeman. While he was descending from a box car by means of a ladder attached to its side, his foot slipped on a round brace rod which extended diagonally across the face of the car and under the ladder. He fell to the ground and was injured. The court said:

"The ladder itself was not defective. In its structure it complied with the regulations of the Interstate Commerce Commission made in pursuance of the act. 'United States Safety-appliance Standards' —order of March 13, 1911. It is unnecessary to set forth these regulations. The only one important here prescribes—'Minimum clearance of treads, (shall be) two (2), preferably two-and-one-half (2½), inches.' The round brace rods with which the car was equipped extended outward from the wall of the car a distance of more than an inch. These brace rods operated to strengthen the walls of the car. That was their only purpose; and there is no doubt as to their necessity for that purpose. The brace rod in question ran down the side of the car at an angle of about 45°. The ladder overlay the brace rod, and cleared its outermost surface by more than the prescribed 2½ inches. * * * In the light of the long-continued use of brace rods of the type here in question in the same relation to the ladder as is the case here, we may fairly presume that the Interstate Commerce Commission in the performance of its duties was aware of the situation, and knowingly permitted its rule in respect of the ladder clearance to remain without change. * * *

"The regulation having been made by the commission in pursuance of constitutional statutory authority, it has the same force as though prescribed in terms by the statute. And the railway company having strictly complied with the regulation has discharged its full duty so far as the ladder requirement of the Safety Appliance Act [45 U.S.C.A. §§ 11, 12] is concerned."

On the doctrine of "assumption of risk," Scarlett saw and knew of the cross rod underlying the ladder, or in the exercise of ordinary prudence should have seen it and realized the danger which it created. In the present case the plaintiff did not know of the defect in the wigwag system which caused the red light to cease swinging and the bell to stop ringing when a northbound train had not passed the crossing. On the contrary, she believed that they continued to operate alike with both north and southbound trains until the crossing was cleared.

Moreover, if the Railroad Commission of California has approved the arrangement of the particular wigwag system which was installed at Corning, or any similar system, with the defect upon which the plaintiff relies as ground of negligence, no such rule was offered in evidence. All that appears in this record regarding the alleged approval of this wigwag system by the Railroad Commission is the statement made by Clarence Walker, the appellant's signalman, who, in response to the question, "But there isn't any reason why you couldn't have a signal that rings when the crossing is blocked going either way?" replied, "I don't know. Those plans are approved by the Railroad Commission before the bells are installed. That is engineering." We are of the opinion the preceding statement is not adequate proof that the Railroad Commission adopted rules or approved the wigwag system which was installed at Corning. We assume that the Railroad Commission, being a quasi judicial tribunal, has the delegated authority to adopt and enforce reasonable rules and regulations. But it does not follow that it may adopt unreasonable rules which may authorize the maintenance of a trap to lure employees or individuals into danger. We assume it has not done so. The evidence does not show that it approved the system as it exists at Corning or any similar system elsewhere. Under the circumstances of this case, the question of the

appellant's negligence in maintaining what may be deemed to be a defective system was a problem for the determination of the jury.

[13] The defect in the wigwag system, upon which the respondent relies, is adequately alleged in the complaint, in the following language:

"The defendant, Southern Pacific Company, a corporation, willfully, wantonly, carelessly and negligently maintained and operated said electric wigwag signal in a defective condition; * * * that said plaintiff believed that said electric wigwag signal was in proper working order and would swing to and fro, and that the said electric bell would ring loudly in case a train, cars or locomotives were obstructing said intersection."

[14-16] The court did not err in denying defendant's motion for a new trial on the ground of newly-discovered evidence. The evidence contained in the affidavits which were presented on that motion with relation to the plaintiff's alleged intoxication is conflicting. The granting of a new trial rests largely in the discretion of the trial judge and his determination of that motion will not be disturbed on appeal except for a clear abuse of discretion. When there is a substantial conflict of evidence in the affidavits which are presented regarding the issue which is involved in the motion for a new trial, the ruling of the trial court will not be disturbed on appeal. Kataoka v. Hanselman, 150 Cal. 673, 89 P. 1082; Wessel v. Cazaretto, 109 Cal.App. 390, 293 P. 111; Miles v. Miles, 77 Cal.App. 219, 246 P. 143; 20 Cal.Jur. 81, § 58.

There is an abundance of evidence upon which the court was warranted in determining that the plaintiff was not intoxicated at the time of the accident. It appears she left her restaurant about 10 o'clock the night of the accident. She accompanied a friend by the name of Mrs. Mallett to Camp Olive, where they drank one or two glasses of beer. She then drove home and went to bed where she remained until about 3 or 3:30 o'clock in the morning when she arose and started to drive to her place of business. These circumstances are corroborated by other affiants. But more important upon that issue of intoxication is the fact that the plaintiff was taken in an unconscious condition directly from her machine into the defendant's depot, where she was surrounded by some of defendant's employees, none of whom suggested that they detected the presence of the fumes of liquor or any indication that she was intoxicated. Moreover, Dr. Arthur H. Neuser, a reputable Corning physician, who attended her immediately after the accident occurred, averred that:

"Affiant particularly examined said plaintiff to determine whether or not she was intoxicated or was under the influence of intoxicating liquor, or had recently drunk intoxicating liquor; that affiant smelled plaintiff's breath at said time, talked with her, and observed her for the purpose of determining whether or not there was any evidence whatever of intoxication, * * * and affiant did not detect any odor of alcoholic liquor on plaintiff's breath, and saw no other evidence whatever that plaintiff was intoxicated or was under the influence of intoxicating liquor, or had recently drunk intoxicating liquor, and affiant is of the opinion * * * that plaintiff was not then intoxicated or under the influence of intoxicating liquor, or had recently drunk intoxicating liquor."

The judgment and the order are affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.



21 Cal.App.2d 28

WYATT v. MORTIMER et al.

Civ. 5778.

District Court of Appeal, Third District, California.

May 13, 1937.

1. Appeal and error ⇐854(3)

If demurrer is well taken as to any of grounds urged, order sustaining demurrer must be affirmed.

2. Pleading ⇐214(1)

Allegations of complaint must be taken as true on demurrer.

3. Fraud ⇐28

Client of mortgage company *held* entitled to recover from receiver, agents, and employees of company for alleged conspiracy to defraud, whereby company falsely represented value and priority of trust deed which client purchased, although prior trust deed had been given and transferred with-

out consideration, receiver permitted taxes on land to become delinquent, land was sold under foreclosure of prior trust deed in violation of injunction and without consideration, and land was transferred without consideration to prevent client from getting relief.

4. Pleading ⇐243

In action for fraud arising out of complex series of transactions, including fraudulent transfers of land, wherein allegedly fraudulent transfers were made after filing of original complaint, and special demurrer was interposed to third amended complaint showing valid objections to complaint, but complaint stated cause of action, further amendment of complaint should be allowed.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Alfred G. Wyatt against Frank C. Mortimer, as receiver of the American Mortgage Company, and others. From a judgment of dismissal, entered on an order sustaining demurrers to the complaint, plaintiff appeals.

Reversed.

Edwin J. Miller, of Los Angeles, for appellant.

Keogh, Cate & Colver, Alfred E. Cate, Fred Aberle, Don R. Lehman, Leo Goodman, Musick & Burrell, and Harold Larson, all of Los Angeles, for respondents.

PER CURIAM.

This is an appeal from a judgment of dismissal entered upon an order sustaining demurrers to plaintiff's third amended and supplemental complaint without leave to amend.

To the original complaint, Mortimer, as receiver, demurred and the demurrer sustained, and an amended complaint immediately filed. This defendant again demurred to the first amended complaint and the demurrer overruled. Thoreson was then served under the name of John Doe, and the complaint, not being sufficient as to him, was amended, demurrer overruled, and an answer to the second amended complaint filed. The cause was then brought to trial and judgment entered for defendants. Upon a motion for a new trial this judgment was set aside. On account of certain transactions alleged to have been fraudulent and which were brought out at the trial, leave to file amendments to the second amended complaint was granted and J. M. Reynolds was made a defendant. Demurrers were again interposed, but overruled. Again facts were discovered involving a fraudulent transfer, which had taken place subsequent to the filing of the complaint and amendments, and a supplemental complaint was filed adding the Junior Capital Company, Limited, and Leon Herman as defendants. These parties demurred, and with the consent of plaintiff, these demurrers were sustained. A demurrer to these amendments was likewise sustained. Under the direction of the trial court the various amendments were then incorporated in a third amended and supplemental complaint. To this third amended and supplemental complaint demurrers were interposed and this time sustained without leave to amend, which brought the matter before us.

This third amended complaint is too long to more than briefly summarize, but in substance it is alleged that plaintiff was a client of the American Mortgage Company, and set forth facts showing a confidential relationship existing between them. In 1931 the amended complaint alleges the mortgage company advised plaintiff to purchase a $10,000 deed of trust, referred to as the Morris deed of trust, representing that it was a second lien upon property exceeding $45,000 in value and subject only to a first encumbrance of $25,000. It is then alleged that plaintiff, relying upon these statements and others made to induce him to make the purchase, acquired the Morris deed of trust. Shortly thereafter plaintiff left the state, and upon his return some three months later, found that the American Mortgage Company was in the hands of a receiver; that the representations made to him in regard to the Morris transaction were false, and that the mortgage company was and had been for several years, hopelessly insolvent; and that the Morris loan was not a second deed of trust, but was subsequent to the deed of trust for $25,000, and also subsequent to a second deed of trust for $10,000, referred to as the Withers deed of trust, and that the property was not worth in excess of $20,000.

It is further alleged that the second deed of trust for $10,000 was given without consideration and that the makers thereof were relatives of certain officers of the American Mortgage Company, and acted as puppets for the mortgage company. Also it is alleg-

ed the receiver and certain of his agents and employees conspired to defraud plaintiff and permitted the taxes to become delinquent to the sum of $7,500, although in possession of income from the property of from $300 to $600 per month and sufficient to discharge said taxes, and that the receiver used the funds of the trust to acquire the Withers deed of trust, paying therefor the sum of $500 in order to destroy the claim of plaintiff under his ostensible third lien.

The Withers deed of trust, it is alleged, although acquired by the trustee with the funds of the American Mortgage Company, was taken in the name of one Thoreson, who then transferred the same without consideration to his brother-in-law, one Bellhouse. Bellhouse subsequently caused the trustee to proceed to sell the property under the second deed of trust, but before the sale was consummated, plaintiff obtained an injunction enjoining the trustee from selling said property. Upon the decision in favor of defendants upon the first trial in this case, they immediately caused the trustee to sell the encumbered property, in violation of said injunction. The said trustee, so plaintiff alleges, joined the conspiracy to deprive plaintiff of his lien upon the property and purported to sell the mortgaged property to one Herman for a consideration of $3,000, although as a matter of fact Herman paid nothing, and in furtherance of the conspiracy to defraud plaintiff, Herman, without consideration, transferred his alleged title to Junior Capital Company.

It is also alleged all of these transfers were made and accepted with full knowledge of the fraudulent nature of the transactions upon the part of those involved and that they were all without consideration.

It is also alleged the deed of trust for $25,000 had outlawed several months before defendants began the foreclosure proceedings, and that the note came into the hands of Thoreson and Bellhouse after maturity and with notice, and they acquired no greater rights than was held by the original owner. The third amended complaint also set forth facts claiming a merger as to the first and second deeds of trust.

It is the contention of appellant that sufficient facts were alleged in the third amended and supplemental complaint to show that the trustee and his agents occupied a position of confidence; that the acquisition of the property in question was fraudulent; and the trustee in using the property for his own gain committed a fraud upon the creditors of whom plaintiff was one. Plaintiff also contends that defendants acquired the deed of trust after maturity; that the sale was held in violation of the injunction; and that the defendants fraudulently conspired to permit taxes and assessments to go unpaid for the purpose of defrauding plaintiff, and other allegations of a similar and kindred nature.

For the right to maintain such action plaintiff cites Briggs v. Crawford, 162 Cal. 124, 121 P. 381, as authority for the right of a holder of a subsequent encumbrance to maintain a suit to remove, as a cloud on his title, a prior fraudulent encumbrance where the consideration had failed.

Plaintiff also relies upon the case of Papineau v. Security-First National Bank (Cal.App.) 46 P.(2d) 756, which case dealt with the culpability of a trustee and of a trustee's agent for failure to properly administer trust funds, and Garris v. Mitchell, 7 Cal.App.(2d) 430, 46 P.(2d) 225.

[1-3] The demurrer raised practically all of the grounds provided in the code, and it is argued by respondents that these demurrers were properly sustained. In a complaint of the length of the one before us, dealing with allegations of conspiracy and fraud and the acts and conduct of a trustee and his agents, it may well be that the pleader has failed to meet all of the objections that might be reached by special demurrer, and if a demurrer is well taken as to any of the grounds urged, the order sustaining the same must be affirmed. However, accepting the allegations of the complaint as true, as we must upon demurrer, it appears that plaintiff, by reason of the acts of the Mortgage Company and those acting with and for it, has suffered loss and damage, and if it is possible to state a cause of action, that opportunity should be afforded plaintiff.

The trial court, in a memorandum opinion sustaining the demurrers and dismissing the action, found that plaintiff had been wronged but could find no remedy therefor. We believe, however, that even if the complaint in its present form does not meet all the requirements suggested by defendants, it does state a cause of action. An examination of the record shows that the complaint before the court is a third amended complaint, but due to the number of parties involved and the complexity of the issues, that is not, under the circumstances, an unreasonable number of attempts to state a cause of action.

[4] We believe, therefore, that the court should have permitted plaintiff to have amended his complaint, if so advised, in order that he might have had his remedy if one exists, for the defendants, if liable, should be held responsible for their acts and conduct.

The trial court is therefore directed to overrule the demurrers as interposed, or to permit plaintiff, if so advised, to file a further amended complaint in the action. It may be, upon the trial, plaintiff cannot sustain the allegations of his complaint, but that is a matter not before us.

The judgment appealed from is reversed.



21 Cal.App.2d 49

RATHBUN v. PAYNE.

Civ. 10079.

District Court of Appeal, First District, Division 1, California.

May 17, 1937.

Hearing Denied by Supreme Court July 15, 1937.

1. Master and servant ⇐318(1)

To establish relation of master and servant, complete control must be shown; right to make suggestions as to detail or right of control for restricted purposes being insufficient.

2. Master and servant ⇐316(1)

Existence of relation of master and servant must be determined from whole situation, and not from isolated facts considered as constituting the whole.

3. Automobiles ⇐244(29)

Evidence disclosing that automobile driver was route carrier of defendant's newspaper, that defendant owned route and paid weekly amount to route carrier based on route mileage as partial compensation for gasoline used and upkeep of automobile, that carrier furnished his own automobile and purchased papers from defendant which he sold and delivered to customers of whom no record was kept by defendant, and that defendant procured insurance of blanket life policy for benefit of employees including carrier, *held* insufficient to permit recovery for injury caused by carrier's negligence, on ground that carrier was in defendant's employ.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Vera A. Rathbun against George H. Payne, as executor of the last will and testament of G. Logan Payne, deceased. Judgment for plaintiff, and defendant appeals.

Reversed.

Hearing denied by Supreme Court; CURTIS, J., dissenting.

Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, for appellant.

George K. Ford, of San Francisco, and Jensen & Holstein, of San Jose, for respondent.

PER CURIAM.

Plaintiff recovered a judgment against the defendant in a personal injury action based upon the negligence of an automobile driver alleged to have been in defendant's employ.

The defendant, who has appealed, contends that the evidence fails to show the alleged employment; that the trial court erred in certain of its instructions to the jury; and that both the court and plaintiff's counsel were guilty of prejudicial misconduct.

It is admitted that the driver, named Asbitt, was a route carrier of newspapers for the defendant, who does business and publishes a newspaper under the name of San Jose Evening News. At the time of her injury the plaintiff was riding in a Ford coupé owned and driven by Asbitt, who was then delivering newspapers. The latter was known as a motor route delivery man; his territory covered some 63 miles and required several hours of his time each day to serve the subscribers. He had been so engaged for about four years. The plaintiff had been a teacher in the public schools, and was engaged to be married to Asbitt. She usually accompanied him on his route each Saturday. On these occasions she assisted in rolling the newspapers and serving the customers, and also familiarized herself with the route in order that she might make the deliveries in case he might be temporarily unable to do so. At other times she would roll and deliver the papers alone over part of the route, using her own automobile for this purpose. In 1933 the two entered into an

agreement that she should render this service regularly each week; and Asbitt testified that defendant and his employees knew that she was so assisting him. This continued to and including the day on which she was injured, and she was so engaged when the injuries happened. It was testified that her assistance enabled Asbitt to make his collections and render prompt deliveries to the subscribers; but it appears that she received no pecuniary compensation for the services. The evidence shows that the route was owned by the defendant, who paid an amount weekly to the route carrier based on the route mileage, this payment being a partial compensation for the gasoline used and car upkeep. The carrier furnished his own automobile and purchased the papers from the defendant. In turn he sold and delivered the same to his customers, of whom no record was kept by the defendant. He retained the difference between the sums paid for papers and the amounts received from the customers. No account of receipts was rendered to the defendant, and, with the exception of the mileage allowance, the carrier bore all the expense. The defendant controlled the conduct of the work to the extent that it was the carrier's duty to make regular and prompt deliveries, to use his efforts to increase the circulation and promote the good will of the public toward the paper. In addition he attended meetings where ways and means of furthering the interests of the paper in the above respects were discussed. During a period, which was some time previous to the accident, it was defendant's custom to accept in lieu of cash for the papers sold to Asbitt the produce of farmer subscribers. This produce would be hauled by the carrier and, so far as shown, he received no compensation therefor.

It is clear from the evidence that either party was free to terminate the arrangement at will; and that, although the defendant exercised supervision over the service, the carrier was to effect the deliveries and retain the results, which he acquired by such means as he saw fit. In this respect the case closely resembles State Compensation Insurance Fund v. Industrial Acc. Comm., 216 Cal. 351, 14 P.(2d) 306, and one therein cited with approval, namely, Gall v. Detroit Journal Co., 191 Mich. 405, 158 N.W. 36, 19 A.L.R. 1164, wherein it was held that the relation of employer and employee was not shown. With one exception the facts disclosed by the record in the present case differ in no material respect from those in Bohanon v. James McClatchy Publishing Co. (Cal.App.) 60 P.(2d) 510, in which the evidence was held not to establish the relation of employer and employee. The exception is that in 1934 the defendant procured the issuance of a blanket policy of life insurance for the benefit of his employees, who, however, contributed to the payment of premiums. The carrier was included therein and described as an "employee."

[1,2] While this was a fact tending to show the carrier was something more than an independent contractor, it has been held that even the payment of wages is insufficient of itself to establish the relation here claimed. Independence Indemnity Co. v. Industrial Acc. Comm., 203 Cal. 51, 58, 262 P. 757; Arnett v. Hayes Wheel Co., 201 Mich. 67, 166 N.W. 957, 959. Nor is it enough that the defendant had assumed the right to make suggestions as to detail, or had the right of control for a restricted purpose, complete control must be shown (Moody v. Industrial Acc. Comm., 204 Cal. 668, 269 P. 542, 60 A.L.R. 299), which was not the fact in the present case. As in other cases, the relationship must be determined from the whole situation and and not from isolated facts considered as constituting the whole. Westcott v. Gilman, 170 Cal. 562, 150 P. 777, Ann.Cas.1916E, 437.

[3] When the facts which make up the relation between the parties here are considered, and although the defendant did exercise some measure of control and in the respects mentioned appeared to regard the carrier as an employee, nevertheless, as in the Bohanon Case, it is manifest that the right of control which he reserved related not to the means to be used but to the result to be accomplished. Khoury v. Edison Electric, etc., Co., 265 Mass. 236, 164 N.E. 77, 60 A.L.R. 1159.

This being true, the verdict on the issue of employment was unsupported, and it will therefore be unnecessary to consider the other grounds urged for reversal.

The judgment is reversed.

NAIFY et al. v. PACIFIC INDEMNITY CO. et al.*

Civ. 5675.

District Court of Appeal, Third District, California.

May 20, 1937.

Hearing Granted by Supreme Court July 19, 1937.

1. Insurance ⇐228

To effect cancellation of insurance policy, insurer must strictly comply with conditions of policy providing therefor.

2. Insurance ⇐229(3)

Automobile finance company, to which motor company assigned contract for conditional sale of automobile and delivered insurance policy covering it, had no authority to accept notice of or consent to cancellation of policy as to purchaser.

3. Insurance ⇐230

To cancel automobile insurance policy, requiring statement in notice of cancellation that unearned premium, if not tendered to insured, would be refunded on demand, such refund must be tendered with such notice, not at later date, where letter containing notice does not so state.

4. Insurance ⇐230

Unearned portion of premium paid for automobile insurance policy claimed to have been canceled *held* not credited to account of purchaser of insured automobile and thereby refunded to him by deduction of amount thereof from one of installment payments under conditional sale contract including insurance premium in amount payable, where purchaser continued to pay installments in same amounts, which included pro rata payments on premium; reduction of total balance by amount of such refund not being effectuated until last payment.

5. Insurance ⇐230

Automobile finance company's letter, notifying purchaser of insured automobile that policy was canceled and that company had instructed insurer to remit unearned premium to it and would credit amount thereof against balance due on conditional sale contract because of such company's full payment of premium and inclusion thereof in contract, *held* not valid cancellation of policy, in absence of tender of such premium to purchaser or statement, required by cancellation clause, that excess premium would be refunded on demand.

6. Insurance ⇐229(2)

Automobile finance company's letter, notifying purchaser of insured automobile of cancellation of policy, *held* ineffective as cancellation thereof, where court found on undisputed evidence that letter was never received by purchaser, regardless of sufficiency of evidence to support court's finding that it was actually mailed.

Term "mailed" implies deposit of letter in United States post office or custody of United States mail collector.

[Ed. Note.—For other definitions of "Mailed," see Words & Phrases.]

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Action by Fred Naify and another against the Pacific Indemnity Company and others. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Jerome D. Peters, of Chico, for appellants.

J. Oscar Goldstein, P. M. Barceloux, and J. M. McPherson, all of Chico, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This appeal arose from an action on an automobile insurance policy brought by Fred Naify, the insured, and W. L. Clark, the injured party, as plaintiffs, in separate causes of action in a complaint against Pacific Indemnity Company, the insurer, Pacific Nash Motors Company, the vendor of the automobile in question under a conditional sales contract to Fred Naify; and Pacific Finance Corporation of California, the assignee of the contract, and the agent of the Pacific Indemnity Company in connection with the insurance of the automobile in question.

The amended complaint sets forth four causes of action, the first three in favor of Naify and the fourth in favor of Clark. The first two causes of action in favor of Naify are substantially the same, being based upon the terms of the insurance policy, and set forth the following facts: On October 15, 1932, Fred Naify bought an automobile from the Pacific Nash Motor Company, herein referred to as the Motor Company, under a conditional sales contract, which called for payments in the sum of $118.75 per month, which included pro rata

*For subsequent opinion see 76 P.2d 663.

payments in the sum of $109.10, being the premium on an insurance policy taken out by the Motor Company, which was included in the total purchase price of the automobile. On the same day the Motor Company secured from the Pacific Indemnity Company, herein referred to as the Indemnity Company, a policy of insurance covering fire, theft, collision, property damage to others, and personal liability. Thereafter and on October 24, 1932, the Motor Company assigned the conditional sales contract to defendant Pacific Finance Company and at the same time delivered to the Finance Company the policy of insurance on the automobile. On July 18, 1933, and while this policy, as alleged in the amended complaint, was in full force and effect, Lee Naify, a brother of plaintiff Fred Naify, the assured, while driving the automobile of Fred Naify, with his permission, collided with an automobile driven by plaintiff Clark, which resulted in personal injuries to Clark and damage to his automobile, as well as damage to the automobile of Fred Naify. Clark filed suit against Naify to recover damages sustained by him in this collision. Due notice was given by Fred Naify to the Indemnity Company, both of the accident and of the suit. He was then informed for the first time by the Indemnity Company that the coverages for public liability, property damage, and collision had been canceled December 17, 1932, and therefore they were under no liability whatever to defend the action.

The third cause of action alleged in the amended complaint in favor of Fred Naify and against the Motor Company and the Finance Company is based upon the obligation of these companies to either keep the insurance in force or duly notify the insured of any cancellation thereof so as to give him an opportunity to obtain further insurance.

The fourth cause of action was in favor of Clark and against the Indemnity Company, and is based upon a provision of the policy to the effect that, in case judgment was secured against the assured by the injured person, an action might be brought on the policy by the latter to recover the amount of the judgment.

The defense to this amended complaint was that on December 17, 1932, pursuant to the request of the Indemnity Company, a letter was sent to Fred Naify by the Finance Company notifying him that the policy in question was being canceled as of December 22, 1932, and that by reason of that letter the insurance in question was canceled on December 22, 1932, and was therefore not in force on the day of the collision. The answer further denied the allegations in the complaint relating to the liability of the Finance Company and the Motor Company for failure to keep the insurance in force. The action was tried before the court sitting without a jury, and judgment entered in favor of plaintiff for the amount sued for.

The court found in regard to notice of cancellation that on December 17, 1932, a letter was mailed by the Finance Company to Fred Naify, but he never received the same and had no knowledge whatsoever at any time prior to the collision of the cancellation of the policy. The court also found that Fred Naify tendered to defendants the balance remaining due under the retention provision of the policy, which tender was refused, and further found that prior to the institution of this action Naify paid to defendants Motor Company and Finance Company the balance due on the automobile, including the sum of $109.19, which was the full amount of the premium on the policy, without any reduction for unearned premium for those coverages purported to have been canceled.

This appeal has to do with the legal effect of the purported letter of cancellation of December 17, 1932. The facts as developed by the testimony show that on October 15, 1932, Lee Naify, brother of Fred Naify, acting as agent for his brother, Fred, negotiated with the Motor Company for the purchase of an automobile. The sales manager of the Motor Company told Naify that it was mandatory to take out insurance on any car purchased on installments for the period in which the installment payments were to be made to insure the car against fire, theft, property damage, collision, and public liability.

Thereupon Naify, upon behalf of his brother Fred, signed Fred's name to two blank forms of conditional sales contract for the purchase of the car in question. At that time Lee Naify was residing in Redding, and gave his address as Box 44, Redding, Cal., and gave the address of his brother Fred as Senator Theater, Chico, Cal.

The conditional sales contract which was subsequently filled in by the Motor Company shows the purchase of a Nash coupé, calling for the payment of $118.75 on the first day of December, 1932, and a like sum on the first day of each month for eleven months

thereafter. On the same day, October 15, 1932, the Motor Company took out insurance on the automobile with the Indemnity Company through the agency of the Finance Company for the benefit of both itself and Fred Naify, and for the protection of their respective interests, the policy being for a term of one year beginning October 15, 1932. The coverages therein were for the items hereinbefore mentioned and called for a total premium of all the insurance coverages for one year of $109.19, which premium was paid by the Motor Company to the Finance Company, and was included in the total amount due to the Motor Company from Naify under the conditional sales contract. Thus, each payment under the conditional sales contract included a pro rata payment to the Motor Company for the insurance on the automobile.

No duplicate copy of this conditional sales contract was sent to or received by either Fred or Lee Naify, nor did either of them see or receive the original or a copy of the insurance policy which was issued at the same time, both instruments being retained by the Motor Company, nor did they receive any statement indicating the amount of the monthly payment on the automobile as distinct from the payments of the insurance and other charges therein, the coupon book which they received merely showing the monthly payments to be $118.75. On October 24, 1932, the contract was assigned by the Motor Company to the Finance Company, which thereafter retained possession of the contract, together with the insurance policy, until the contract was reassigned by the Finance Company to the Motor Company on August 29, 1933.

Differences arose between the Naifys and the Finance Company and the Motor Company in regard to an allowance on a trade-in, and in December both Lee and Fred Naify called upon the Finance Company and the Motor Company concerning this dispute, but nothing was said by the representatives of either company relative to any cancellation of insurance. In January, 1933, Lee Naify again went to San Francisco and had a further discussion with the Finance Company in regard to these differences, and at that time made two payments of $118.75 each on the contract, being for the months of December and January, receiving a receipt therefor. At that time nothing was said to him by any representative of the company concerning the insurance on the automobile. On February 7, 1933, another payment of $118.75 was made to the Finance Company for which a receipt was issued, and at that time, also, nothing was said about insurance. Subsequent payments on the car were handled through Mr. Gottesfeld, as attorney for Mr. Naify.

On July 18, 1933, a collision occurred between the Naify car and the car of Clark. Immediately after the collision a telegram was sent to the Motor Company reporting the accident and inquiring concerning the insurance on the car. The following day Fred Naify received a wire from the Motor Company stating that there was a Pacific Indemnity policy with coverages for property damage and public liability, and giving the number of the policy. The next day Naify went to the local agency of the Indemnity Company in Chico and reported the accident, giving the number of the policy. On July 20, 1933, the local agent of the Indemnity Company wired a report of the accident to San Francisco. In a day or two Naify received a telegram from the Finance Company as follows: "Find the collision coverage cancelled last December. Disregard former wire stating you were covered."

According to the finding of the court and the testimony of the Naifys that was the first notice of cancellation or of knowledge whatsoever they had received of the cancellation of the insurance. On October 26, 1933, Fred Naify received from the Motor Company a statement showing a credit or refund for insurance. Up to that time he had received no information or knowledge of any kind of credit being given to his account for any insurance refund. In August, 1933, and after the commencement of the action by Clark, Naify went to San Francisco and tendered the balance of the 50 per cent. retention on the collision coverage, which tender was refused. In December, 1933, Naify paid off the full balance on the automobile, including the balance on the insurance. No deduction was made for the amount of the credit for the insurance supposed to have been canceled, and he received a receipt of payment in full together with the pink slip for the automobile, and no refund of any excess amount for the unearned premium on the alleged canceled insurance was made by the Motor Company, and they kept and retained the unearned premium alleged by plaintiff to have been $62.85.

It is claimed by appellants that on December 17, 1932, a letter was mailed to Fred Naify and addressed to him at Redding,

Cal., notifying him that the coverages for collision, property damage, and public liability would be canceled as of December 22, 1932, and that subsequently a credit for the unearned premium on these coverages in the sum of $62.85 was placed to his credit, and that a statement showing this credit was mailed to him. Fred Naify testified that he never received either the notice or the statement, and the trial court so found.

The trial court also found that no credit for unearned premium of the canceled insurance was ever given to Fred Naify in accordance with the provisions of the insurance policy relating to cancellation.

Turning now to a consideration of the question of law involved, it is claimed by respondent that the letter of the Finance Company to Naify did not constitute a valid cancellation for the reason that the letter did not conform to the requirements of the provision of the policy relating to cancellation; that it was never received by Fred Naify, and there is no evidence that the letter was actually mailed.

The provision of the policy relating to cancellation provides that the policy may be canceled at any time by the company by giving to the assured "* * * a five (5) days' written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired term, which excess, if not tendered shall be refunded on demand. Notice of cancellation shall state that said premium (if not tendered) will be refunded on demand. Notice of cancellation mailed to the address of the assured stated in this policy shall be a sufficient notice. When the term Assured is used in this paragraph, it shall mean the Pacific Finance Corporation of California only during the time the Pacific Finance Corporation of California has any financial interest in the automobile insured hereunder. If the Pacific Finance Corporation of California has no financial interest, then the term Assured, shall mean the purchaser."

It is undisputed that at the time of the purported cancellation the Finance Company had an interest in the automobile in question, and under the terms of the cancellation clause was entitled to notice thereof, together with a refund of the unearned premium. However, the only notice ever sent to the Finance Company was a request from the Indemnity Company to the Finance Company to recall the policy for cancellation, which could not be construed as a present cancellation. If the cancellation clause meant to include both the Finance Company and the purchaser, Naify, as the "insured," where both had a financial interest in the automobile, then it was the duty of the Finance Company to send notice of cancellation to both the Finance Company and the purchaser, which admittedly was not done.

The only notice relied upon by appellants as a cancellation under the cancellation clause in the policy is the following letter:

"December 17, 1932

"Mr. Fred Naify
"Box 448—Redding Theatre
"Redding, California

"Re: Pacific Indemnity Company
"Policy No. AFO-37769

"Dear Sir:

"We have been instructed by the Pacific Indemnity Company, as its insurance agent, to cancel the 50% Retention, Public Liability, and Property Damage coverage on your Policy No. AFO-37769 covering your 1932 Nash Coupe.

"In conformity with paragraph No. 5 captioned 'Cancellation' on the last page of your policy, you are hereby notified that the above coverages on the above numbered policy are cancelled from and after the 22nd day of December, 1932, at 12:01 Standard time.

"As the legal owner of the above described automobile, and as an assured named in the above numbered policy, we have instructed the Pacific Indemnity Company to remit the unearned insurance premium to us and when it is received, we will credit it against the balance due on your contract, for the reason that the premium for this coverage was fully paid by the Pacific Finance Corporation of California at the time this insurance was placed with the Pacific Indemnity Company, and, of course, the premium was charged back to you and included in your contract.

"Yours very truly,
"Pacific Finance Corporation of California.
"By J. G. Kirkman
"Automobile Insurance Department."

[1, 2] To effect the cancellation of the policy the insurer must strictly comply with the conditions of the policy providing therefor. Quong Tue Sing v. Anglo-Nevada Assurance Corporation, 86 Cal. 566, 25 P. 58, 10 L.R.A. 144. This letter shows that there was no tender of the excess for unearned premium and no statement as required by the cancellation clause that the excess pre-

mium would be refunded on demand. It is true the letter states: "As the legal owner of the above described automobile and as an assured named in the above numbered policy, we (Finance Company) have instructed the Pacific Indemnity Company to remit the unearned insurance premium to us * * *" but it cannot be said that the Finance Company was also acting for respondent Naify. As to him the Finance Company had no authority to accept notice of, or consent to, cancellation. Quong Tue Sing v. Anglo-Nevada Assurance Corporation, supra, and Lauman v. Concordia Insurance Co., 50 Cal.App. 609, 195 P. 951.

[3] Appellants claim the excess premium was, in effect, refunded to Naify by means of a credit to his account on January 5, 1933. However, inasmuch as the letter of cancellation did not state the excess premium would be refunded on demand, it was necessary that the refund be tendered with the notice and not at some later date. The object of the immediate tender is obvious. The insured is entitled to know that the insurance had definitely been canceled and that he is without protection. He is also entitled to the refund or the credit in order that he may, if necessary, use that refund or credit to obtain other protective insurance.

[4] Although it is contended by appellants that the unearned premium was credited to the account of Naify on January 5, 1933, that fact was not supported by the evidence. The conditional sales contract included the insurance premium, and each payment was increased pro rata by that amount. On January 5, 1933, if the policy was canceled, there was an insurance refund credit due in the sum of $62.85. This credit was attempted to be given by deducting this amount from the balance due, and credit was given on the twelfth payment, which, instead of being $118.75, was reduced to $55.90. So although mathematically the total balance was reduced by the amount of the refund being credited to the account of Naify, it was not effectuated until the date of the last payment some months later, and in the meantime Naify was required to pay the original monthly installment of $118.75, which still included the pro rata payments of $109.10 together with pro rata payments of interest on that amount.

In B. & B. Trucking, Inc., v. Home Fire & Marine Ins. Co. of California, 125 Misc. 312, 209 N.Y.S. 511, 513, affirmed 216 App. Div. 744, 214 N.Y.S. 812, affirmed 243 N.Y. 558, 154 N.E. 604, a policy containing an identical cancellation clause was before the court. It is there said: "It is argued for defendant that the notice of cancellation should be considered entirely sufficient to cancel the policy, though it does not comply with the requirement that 'notice of cancellation shall state—excess premium (if not tendered) will be refunded on demand.' * * * The provision quoted was not complied with. Defendant's position, as stated in the notice of cancellation, was not simply that the excess premium would be refunded on demand. Its position was that it would not refund without surrender of the policy. My view is that a notice of cancellation must comply with the requirements of the cancellation clause if such notice is, of itself and without the assistance of any elements of waiver or estoppel, to have effect of canceling the insurance. * * * Defendant would separate the cancellation clause into two parts, one providing for cancellation and the other for the return of unearned premium. * * * The policy provides that the insurance may be canceled by a notice which may be mailed. It provides in terms that the notice 'shall state that—excess premium (if not tendered) will be refunded on demand.' By their contract the parties have stipulated that defendant can cancel the contract if it complies with this requirement. The company is not left free to say it will cancel without such compliance. Nor is the court free to say that this or any other stipulation of the contract consistent with its main purpose may be disregarded, because to the court it appears to be of no great moment. Plaintiff is entitled to insist on conformity with a condition to cancellation stipulated for in unmistakable terms. * * * I do not consider a notice of cancellation to be sufficient which does not comply with the provision that the notice shall 'state that excess premium (if not tendered), will be refunded on demand.' This is an express requirement and one with which defendant did not comply. It cannot be avoided by regarding the cancellation clause, as defendant would have us regard it, as providing separately for cancellation and for the return of unearned premium, for the statement required as to the return of unearned premium is expressly made a condition of cancellation by notice sent through the mails."

[5] From the foregoing it would appear that the letter of December 17, 1932, could not be considered a valid cancellation in accordance with the provisions of the

policy, even if it be assumed the letter was actually mailed and received. It will be recalled also that the premiums on the policy were paid in full to the Indemnity Company by the Motor Company at the time of the issuance of the policy, and therefore, so far as the Indemnity Company was concerned, the premium was fully paid. It would therefore rest upon the Indemnity Company to pay in cash the unearned premium which should have been paid directly to the assured regardless of any indebtedness which may have existed between Naify and the Finance Company.

In Phœnix Assurance Company v. Munger, etc., Manufacturing Co., 92 Tex. 297, 49 S.W. 222, 225, an analogous situation existed. The court there said: "Upon the issue of cancellation, the evidence showed that the assured had paid a portion of the premium, and had given his notes to the agent for the balance, and the agent had paid the entire premium to the company, holding the notes of the assured as his individual property. When the notice of desire to cancel was given, just before the fire, there was no tender made to the assured of the unearned premiums, and we are therefore of the opinion that the cancellation was not effectual."

To the same effect is the case of Krause v. Equitable Life Assur. Soc., 99 Mich. 461, 58 N.W. 496.

[6] The court found in accordance with the undisputed evidence that this letter in question was never received by Fred Naify. The rule in regard to cancellation under an insurance policy is stated in Farnum v. Phœnix Ins. Co., 83 Cal. 246, 23 P. 869, 872, 17 Am.St.Rep. 233, as follows: "If the notice is sent by mail, and not received, as in this case, the cancellation for non-payment of premium is ineffective. Mullen v. Dorchester Mutual F. Ins. Co., 121 Mass. 171. Notice of cancellation to the agent who negotiated the policy will not bind the assured; * * * nor to any other person than the one obligated to pay the premium."

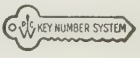
This rule is followed in American Building Maintenance Co. v. Indemnity Ins. Co., 214 Cal. 608, 7 P.(2d) 305, 307, in which the insurance policy under consideration provided that "notice of cancellation mailed to the address of the assured herein shall be sufficient notice."

Respondents raised some question as to the sufficiency of the evidence to support the finding of the trial court that the letter in question was actually mailed, the testimony being that a clerk in the insurance department of the Finance Company placed the letters in the mail basket, which was then taken up by another employee, whose duty it was to place these letters in the mail pouch. There were many letters written and mailed during the course of the day, and none of those who handled the letter could identify or recall the particular communication in question.

Also the term "mailed" implies the deposit of the letter in the United States post office or in the custody of a United States mail collector, but here there is no affirmative proof that this was ever done. We do not believe that we need to consider that matter, however, in view of the direct finding of the court that the letter was, as a matter of fact, never received by the insured.

For the foregoing reasons, the judgment from which this appeal is taken is hereby affirmed.

We concur: THOMPSON, J.; PLUMMER, J.



21 Cal.App.2d 57

PEOPLE v. ACOSTA.

Cr. 1546.

District Court of Appeal, Third District, California.

May 17, 1937.

Rehearing Denied June 1, 1937.

Hearing Denied by Supreme Court June 14, 1937.

1. Homicide ⇐253(1)

Evidence *held* to sustain conviction of first degree murder.

2. Homicide ⇐300(3)

In murder prosecution, instruction that it must appear to accused as reasonable man that killing was "absolutely" necessary to avoid danger to himself *held* not prejudicial, under other self-defense instructions, since jury would understand that when reasonable man was placed in sudden jeopardy, "absolute" necessity existed.

3. Homicide ⇐340(2)

As respects deliberation and premeditation instructions in prosecution for murder, that mere abstract statements of law were given did not carry conclusion that prejudice resulted therefrom.

4. Witnesses ⊂=327

Testimony may be introduced to show that witness was laboring under influence of intoxicating liquor at time occurrences took place as to which he has testified.

5. Witnesses ⊂=351

Where witness testified he saw another witness on premises where homicide occurred on day of such homicide, about which such other witness testified, excluding testimony as to such other witness' sobriety on such day *held* not error, since no proper foundation was laid showing that witness saw such other witness at or about time of homicide or within time closely connected therewith.

Appeal from Superior Court, Sacramento County; Martin I. Welsh, Judge.

Antonio Acosta was convicted of first degree murder, and he appeals.

Affirmed.

James F. Gaffney and Horace E. Dunning, both of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER delivered the opinion of the court.

The appellant was convicted of the crime of murder in the first degree, with punishment fixed at imprisonment in the state prison for life, upon an information charging that on or about the 8th day of September, 1936, in the county of Sacramento, the appellant wilfully, etc., did kill and murder one Frank Valdez, a human being. From the judgment of conviction and the denial of his motion for new trial, the appellant prosecutes this appeal.

The record shows that the homicide was committed on September 8, 1936, in a saloon known as the "Silver Creek Barroom," in the city and county of Sacramento. The killing took place some time between the hours of 5 and 6 p. m. on the day mentioned.

It appears from the transcript that prior to the fatal affray the appellant and Valdez admitted that, after indulging in a few drinks, they left the saloon and went to the room occupied by Valdez. It does not appear from the record all that took place in the room just mentioned, but the record does show that the appellant and Valdez engaged in a fist fight, and that some time during the fistic encounter, according to the testimony of the appellant, Valdez stated that he would "get" him (referring to the defendant). At the conclusion of the fistic encounter the appellant left the room occupied by Valdez, went to where he had an automobile parked, and endeavored to start the same. Not succeeding, he went to his own room and armed himself with a revolver. Prior to leaving the room occupied by Valdez, the appellant testified that Valdez went to a bureau in the room, opened a drawer therein, and took therefrom a revolver. After arming himself with a revolver, and after the lapse of something over one hour, the appellant again repaired to the Silver Creek Barroom. The testimony introduced by the People shows that, immediately upon entering the barroom, the appellant began shooting at Valdez. The autopsy held on the body of Valdez shows that he had been shot five times. On entering the barroom it appears that Valdez said, "Here you are" (referring to the appellant). The testimony further shows that, when the appellant entered the barroom, the deceased and others were standing at the bar drinking beer. The testimony of the appellant is to the effect that when he entered the barroom the deceased made a motion indicating that he was about to pull a revolver from somewhere on his person. There is other testimony in the record, however, to the effect that the deceased simply threw up his hands. No other witness other than the appellant testified that the deceased made any motion indicating that he was about to draw a gun. There is ample testimony in the record justifying the jury in coming to the conclusion that the appellant, after the fight with the deceased and after the lapse of an hour, went to the Silver Creek Barroom, and, upon entering the same, observed the deceased and began shooting at him, without the deceased having made any movement indicating an intention to draw a gun that was upon his person. The deceased, the testimony shows, was armed. After his death it was discovered that a revolver was in his belt on the right side of his person.

The appellant relies upon the theory of self-defense. A careful scrutiny of the testimony shows that, outside of his own testimony, there is nothing upon which to base such a contention.

From the testimony in the case the jury was justified in concluding that the appellant's animosity was aroused, not only by the fight that he had previously had with the deceased, but also by the quantity of intoxicating liquor that he had imbibed, and that the appellant's idea of self-defense was that, as long as the deceased had threatened to "get" him, he, the appellant, in order to protect his own life, had a legal right to shoot the deceased upon sight.

[1] The testimony of the witness introduced on behalf of the appellant only goes to the effect that the deceased had threatened to "get" some one, and not that the deceased had been guilty of any overt acts. The character of the witnesses so testifying was a matter for the consideration of the jury, the record showing, on the part of some of them, former convictions of criminal acts amounting to felonies. Taken as a whole, we think the testimony amply justified the verdict returned by the jury.

Upon this appeal the appellant relies upon alleged errors on the part of the trial court in giving instructions to the jury, and also in excluding testimony hereinafter referred to. The alleged error in the instructions given by the court is based upon the use of the word "absolutely," and is found in two instructions which we here set forth:

"The court instructs the jury that the mere apprehension of danger is insufficient to justify a homicide. The fear, if any, must have been produced by circumstances such as would be sufficient to excite the fears of a reasonable person. The law of self-defense is founded on necessity, and in order to justify the taking of life upon this ground it must not only appear to the slayer, as a reasonable man, that he had reason to believe, and did believe, that he was in danger of his life, or of receiving great bodily harm, but it must also appear to his comprehension as a reasonable man, that to avoid such danger, it was absolutely necessary for him to take the life of the deceased.

"The court further instructs the jury that to justify the killing of another in self-defense, it must appear to the slayer, as a reasonable person, that the danger, if any, was so urgent and pressing that in order to save his own life, or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary. And it must appear that the person killing was the assailant, or, if not the assailant, that the slayer had really and in good faith endeavored to decline further trouble before the fatal blow was struck."

It appears to be the contention of the appellant that by these instructions the jury was advised that the killing must have been absolutely necessary, and that they must so find. Such, however, is not the correct interpretation to be given to the language used by the court. Preceding the use of the word "absolutely" there is a clear and direct statement that it must so appear to the appellant as a reasonable man, and that he had reason to believe, and did believe, etc., and that it appeared to his comprehension as a reasonable man that to avoid such danger it was absolutely necessary to take the life of the deceased. It is all based upon the reasonable appearance, not upon the absolute fact of such a necessity existing. That the conclusion that the jury could not have understood the instruction otherwise than as herein stated, is reinforced by five instructions given at the request of the defendant, two of which are sufficient to illustrate the language used in all five, such language being to the same effect, to wit:

"The court instructs the jury that the real issue raised in this case by the plea of self-defense is whether, at the time the fatal shot was fired, the defendant believed, and had reasonable grounds to believe, that he was in imminent danger of death or great bodily harm, and it is not necessary that you find the defendant to have been in actual danger at the time he fired; but if you find from the evidence that he was in apparent danger of death or great bodily harm at the time he fired the fatal shot, then his act was justifiable, and in determining whether or not the defendant was in apparent danger you are to view the circumstances at the time as they appeared to him, situated as he was at the time.

"The court instructs the jury that justifiable homicide is the killing of a human being in necessary self-defense, or under circumstances sufficient to excite the fears of a reasonable person, and induce him, as a reasonable person, to believe that in order to save his own life or prevent him from receiving great bodily harm, it was necessary to take the life of the person killed."

The court further instructed the jury that, if the evidence on the question of self-defense was sufficient to raise a reasonable doubt in the minds of the jury as to whether the defendant was justified, then the defendant was entitled to a verdict of acquittal.

[2] A reading of these instructions leaves no doubt in our minds as to the fact that the jury was properly instructed on the question of self-defense, and that no prejudice resulted from the use of the word "absolutely."

The language used in the case of People v. Leddy, 95 Cal.App. 659, 273 P. 110, 117, where like instructions were under consideration, is applicable here, to wit: "We are of the opinion that the jury as reasonable men would understand that whenever a reasonable person is placed in sudden jeopardy of life or limb the absolute necessity referred to in the instructions complained of exists."

It would serve no useful purpose to quote the language from the opinions referred to in the different cases where like instructions have been approved. We will therefore simply cite the cases: People v. Bruggy, 93 Cal. 476, 29 P. 26; People v. Webster, 13 Cal.App. 348, 109 P. 637; People v. Westlake, 62 Cal. 303; People v. Cord, 157 Cal. 562, 108 P. 511; People v. Orosco, 73 Cal.App. 580, 239 P. 82; People v. Leddy, 95 Cal.App. 659, 273 P. 110. In several of the cases cited reference is made to other instructions, just as were given in the case at bar, which fully explained to the jury the appearances justifying one in taking the life of another, and fully indicating just what was intended by the language used in the two challenged instructions.

[3] The appellant further challenges the instruction given on the question of deliberation and premeditation. A reading of the instructions on these questions shows that no error was committed. They are too lengthy to be set forth herein. The fact that in some cases mere abstract statements of the law were given does not carry the conclusion that any prejudice resulted therefrom. People v. Wolcott, 137 Cal.App. 355, 30 P.(2d) 601; People v. Robinson, 107 Cal.App. 211, 290 P. 470; People v. Tapia, 131 Cal. 647, 63 P. 1001.

We conclude that the instructions in this case taken as a whole clearly presented to the jury the law which should govern their deliberations and that there is nothing contained in the instructions of which the appellant can reasonably complain, and certainly nothing upon which we could base a decision that prejudicial errors were committed by the trial court in giving any of the instructions in this case.

The excluded testimony assigned as prejudicial error relates to an attempt by the appellant to question a witness as to whether a certain witness who testified on the part of the People was under the influence of intoxicating liquor at the time of the killing. The record shows the following: A witness by the name of Selmos was on the witness stand on behalf of the defendant, and the following questions and answers were given:

"Q. Were you present in court yesterday when a Mr. Olsen testified? A. Yes.

"Q. Did you see Mr. Olsen on the premises known as 1116 Fourth Street, on the 8th day of September? A. Yes.

"Q. Was he around there very much? A. No.

"Q. Was he in and out of there that day? A. Yes.

"Q. What was his condition for sobriety on that day? (This question was objected to as incompetent, irrelevant and immaterial, and the objection was sustained.)"

[4, 5] It is evident from the foregoing that no foundation was laid for the introduction of any testimony as to the inebriety of the witness Olsen, at the time of the killing. No effort was made, and no showing was made to the court that the appellant could show that the witness Olsen was under the influence of liquor at the time the shooting took place. It is not shown that the witness saw Olsen at or about the time of the fatal affray, or within any time closely connected therewith. While we think testimony may be introduced to show that a witness was laboring under the influence of intoxicating liquor, at the time the occurrences took place to which he has testified the record does not disclose such a situation.

We think the record, when carefully considered shows that the appellant, of his malice aforethought, armed himself for the purpose of shooting the deceased upon sight, and that he proceeded to do so without any overt act having been committed by the deceased preceding the time

in the barroom when the appellant fired five shots into the body of the deceased.

The order and judgment are therefore affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



21 Cal.App.2d 21

BASS v. FARMERS MUT. PROTECTIVE FIRE INS. CO. OF SAN JOAQUIN COUNTY et al.

Civ. 5619.

District Court of Appeal, Third District, California.

May 13, 1937.

1. Insurance ⇐379(1)

Where insured, in applying for insurance, deliberately conceals facts or states what is untrue, recovery on policy is barred; but, where insured in good faith states to insurer's representative true conditions of affairs, untrue recordation by agent will not work to the detriment of insured.

2. Insurance ⇐379(2)

Where insured stated to fire insurer's agent that she owned undivided half-interest in realty and life estate in remainder, with fee vesting in her children, agent represented that duty rested on insured to insure property, and prepared application representing that insured's title was sole and unconditional and unencumbered, and policy was issued and twice renewed, such misrepresentation in application and similar misrepresentation in proof of loss *held* not to avoid policy, since insured had insurable interest, and relied on representation of agent and on renewals of policy (St.1935, p. 503, §§ 281, 282; Civ.Code, §§ 2546, 2547).

3. Evidence ⇐265(2)

Claim of loss filed under fire policy constituted only prima facie evidence of loss, and insured was not limited to recovery of amount of claim, where insurer denied any liability, especially where principal object of requirement that insured state amount of claim was to determine insurer's adjustment procedure.

4. Insurance ⇐576(2)

In action on fire policy, insurer's denial of any liability *held* to waive provisions of policy requiring arbitration as to amount of loss.

5. Insurance ⇐640(5)

In action on fire policy providing that parties should determine amount of loss by arbitration, insurer waived defense of failure to submit loss to arbitration by neglecting to plead such failure.

6. Insurance ⇐501

Purpose of provision of fire policy limiting recovery to three-fourths of value of insured property is to protect insurer by removing temptation from insured to carry full value on property and then to cause it to be burned.

7. Insurance ⇐501

Provision of fire policy limiting coverage to three-fourths of value of property insured was inapplicable where amount of loss was far below value of property, since such provision was intended to prevent burning of property by insured.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, judge.

Action by Mrs. Otto F. Bass against the Farmers Mutual Protective Fire Insurance Company of San Joaquin County and others. From a judgment for plaintiff, named defendant appeals.

Affirmed.

Langdon & Tope, of Stockton, for appellant.

Foltz, Rendon & Wallace, of Stockton, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal from a judgment entered against appellant insurance company for damages by fire to a dwelling and its contents. The policy was issued October 3, 1930, and the fire occurred on April 4, 1933. It is undisputed all the personal property belonged solely to respondent and was unincumbered. In regard to the real property it appears that respondent had title in fee to an undivided one-half interest and a life estate in the remaining one-half, the fee vesting in her minor children.

Some time in 1924 J. C. Burson, an agent of, and authorized to write insurance for, the appellant, came to the home of Mrs. Bass, then Mrs. Aldridge, and told her it was time to renew a policy for fire insurance on the buildings and contents situated on property. He asked her if she owned the real property and she told him she owned one-half in fee and in the other one-half she had a life estate. He then told her the duty rested upon her to reinsure the property if she wished to protect her interest and the interest of her minor children. He then filled out the renewal application upon which the policy was issued, which she signed, and which contained the following representations: "What title have you? A. Deed. Is your property encumbered? A. No. How much do you own? A. Fifteen acres."

Owing to the peculiar form of the deed, both Burson and Mrs. Bass could have honestly misunderstood the effect of that instrument. The children were not made parties to the deed. After the description of the property conveyed was inserted, "An undivided one-half of said land to said party of the second part in fee simple, and an undivided one-half thereof to said second party for and during the term of her natural life, and then at her death the remainder over in fee simple to * * * children of said parties."

Burson, the agent, came in 1927 and again in 1930 and renewed the insurance. On the last occasion at least the application was entirely filled out when presented to respondent and she merely signed her name thereto. Each of these renewal applications showed that the property was unincumbered and that title was vested in the applicant as owner.

In the proof of loss filed after the fire, respondent, in answer to a question as to her interest in the land upon which the building stood, again stated she owned the same in fee simple, without encumbrances. The company claim that after the fire they discovered for the first time that respondent did not own the insured lands in fee, and that the land was encumbered, and refused to pay the claim. Thereupon this action was commenced wherein plaintiff sued for the loss and damage sustained.

The principal point relied upon by appellant is that the policy was void by reason of the misstatement of the facts contained in the application for the insurance and in the proof of loss. In this connection the policy provides:

"Matters Avoiding Policy. This entire policy shall be void; (a) if the insured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof; or (b) in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after the loss. * * *

"Unless otherwise provided by agreement indorsed hereon or added hereto this entire policy shall be void, (b) if the interest of the insured be other than unconditional and sole ownership, or (c) if the subject of insurance be a building on ground not owned by the insured in fee simple."

The court found that plaintiff stated to the soliciting agent that she had a qualified ownership in the property. She explained to him, so the court found, that she and her husband, Aldridge, were divorced, and that she owned one-half in her own right and had a life estate in the remaining half. Mr. Burson, the agent, then said: "Well, all the children are under age and it is up to you to insure and keep all buildings insured. You are the one to insure them if you want them insured."

The policy was then written with respondent as beneficiary, and was on two subsequent occasions renewed upon the same information.

[1] The rule is clear that where an applicant deliberately conceals facts or states what is untrue to the insurer, the insured, in case of loss, cannot then recover, but the rule is otherwise where the insured in good faith states to the representative the true conditions of affairs, and the agent otherwise enters the information upon the application. Under such circumstances the untrue recordation by the agent will not work to the detriment of the applicant.

In Cooley's Briefs on the Law of Insurance, vol. 3, p. 2594, it is said: "From an examination of the cases the following propositions may be regarded as established by the weight of authority: Where the insured, in good faith, makes truthful answers to the questions contained in the application, but his answers, owing to fraud, mistake or negligence of the agent filling out the application, are incorrectly transcribed, the company is estopped to assert their falsity as a defense to the

policy. The acts of the agent, whether he is a general agent with power to issue policies, a soliciting agent, or merely medical examiner for the company, are in this respect the acts of the company, and he cannot be regarded as the agent of the insured, though it is so stipulated in the application or policy."

In Menk v. Home Ins. Co., 76 Cal. 50, 14 P. 837, 839, 18 P. 117, 9 Am.St.Rep. 158, construing a policy of fire insurance, it is said: "The only point in the offered testimony was that if the agent, knowing all the essential facts, made out the application for plaintiff, the company cannot take advantage of defective statements contained in it as not complying with the requirements of the company; nor would misstatements be fatal to the claim of plaintiff, which the agent well knew to be false, when he made out the application, received the money of the applicant, and issued the policy. The tenancy of the decisions is plainly to hold all those conditions waived which, to the knowledge of the agent, would make the policy void as soon as delivered. Otherwise the company would knowingly receive the money of the applicant without value returned, and the whole transaction would be a palpable fraud."

In the case of Lyon v. United Moderns, 148 Cal. 470, 83 P. 804, 4 L.R.A.(N.S.) 247, 113 Am.St.Rep. 291, 7 Ann.Cas. 672, this same principle was invoked and held that the insurer was estopped to assert the falsity of the answers given by the assured if he in good faith made truthful answers to the questions contained in the application, but the answers, either due to fraud, negligence, or mistake of the agent of the company filling them out, were incorrectly transcribed.

In the case of State Mutual Insurance Co. v. Green, 62 Okl. 214, 166 P. 105, 108, L.R.A.1917F, 663, the insured told the agent that the record title to the premises was in her husband, but that as a matter of fact the title was in their homestead, and asked insurance in her own name. She was told by the agent that such circumstance made no difference and she could insure the property in her name. In answer to the question, "Have you title to the premises by warranty deed," the agent wrote "yes" after the answer. The court cited Vance on Insurance, p. 304, to the effect that "any information material to the transaction either possessed by the agent at time of transaction or acquired by him before its completion is deemed to be the knowledge of the principal, * * * even though in fact the knowledge is not communicated to principal at all."

In Phipps v. Union Mutual Ins. Co., 50 Okl. 135, 150 P. 1083, it was held that although ordinarily a mere soliciting agent had no authority to waive any of the terms or provisions of the contract of insurance, yet if by a course of conduct he was clothed with power in taking the applications and procuring the company to issue policies thereon, and to do anything necessary to take the application, he had the right to fill it out and it was his duty to do so honestly.

In Allen v. Phœnix Assur. Co., 12 Idaho, 653, 88 P. 245, 8 L.R.A.(N.S.) 903, 10 Ann.Cas. 328, the court, to the same effect, held that if "the insured truthfully and correctly stated the nature and condition of his title in making his application for insurance, he will not be precluded from recovering in case of loss on account of a contrary statements as to title inserted in the policy."

In Wheaton v. North British, etc., Co., 76 Cal. 415, 18 P. 858, 9 Am.St.Rep. 216, it was held that where an agent undertakes to prepare the application for the insured, he will be regarded in doing so as the agent of the insurance company, and not of the insured, and any misstatements therein of which the insured is ignorant, will not be fatal to the policy.

[2] It is true that plaintiff, after the fire and in the proof of loss, in her own handwriting represented that no one other than herself had any interest in the land described in the policy. That, of course, was not a fact, but we may assume that relying upon what had been previously told her by the agent and the renewal of the policy on two separate occasions over a period of several years, that the interest of the children was not material and that she had an insurable interest in her own right she answered the question as she did. We believe, therefore, that as to the misstatements in the application for the insurance and also in the proof of loss, that under the circumstances the policy was not void by reason thereof. Conceding that plaintiff's interest was not that of a sole and unconditional owner, she did nevertheless have an insurable interest in the property. Sections 281, 282, Insurance Code (St.1935, p. 503 [sections 2546

and 2547, Civ.Code]); Breedlove v. Norwich, etc., Ins. Society, 124 Cal. 164, 56 P. 770; Sharp v. Scottish Union, etc., Co., 136 Cal. 542, 69 P. 253, 615.

Another point urged by appellant is that the proof of loss was filed for $600 as damage to the residence and $90 as damage to the personal property. When the loss was not paid upon demand a suit was filed in the sum of $1,200.84 as representing the amount of loss and damage sustained. After trial the court awarded as damages the sum of $759.54, some $69 more than the amount claimed in the proof of loss.

[3] Appellant now claims that the demand of plaintiff was limited by her claim for loss. We do not believe, however, that the parties were bound by the proof of loss, where the claim was rejected in its entirety and the parties forced to submit their differences to a court for determination. The principal object, in the policy in question, in requiring the claimant to state the amount of damage in the proof of loss, was that under the by-laws the amount of loss claimed determined the method of adjustment. If the loss claimed was under $1,500 the president and secretary of the company were authorized to make an adjustment, but if the loss was over $1,500 the board of directors were given that responsibility. In any event, the proof of loss constituted no more than prima facie evidence of loss and there was ample evidence adduced at the trial to support the finding of the court for an amount in excess of the amount specified in the proof of loss.

[4] The policy also provided that, "if there is a failure of the parties to agree on such damage they shall submit the question of the amount of such loss to arbitration". The question here, however, is not merely one of failure to agree on the amount of damage, but is a denial on the part of the company of any and all responsibility, repudiating the policy and rejecting the claim in its entirety, which act was a waiver of the provisions of the policy respecting arbitration.

[5] Furthermore, defendant waived the defense of failure to submit the loss to arbitration by neglecting to plead such failure. In Jacobs v. Farmers' Mutual Ins. Co., 5 Cal.App.(2d) 1, 41 P.(2d) 960, an arbitration provision identical to the one here under consideration was there before the court, and it was there held such a defense must be specially pleaded or it was waived.

In Farnum v. Phoenix Ins. Co., 83 Cal. 246, 23 P. 869, 17 Am.St.Rep. 233, it was held a denial of liability constituted a waiver of the arbitration clause, unless, as in Clogston v. Schiff-Lang Co., 2 Cal.(2d) 414, 41 P.(2d) 555, the policy required that "all differences" be submitted to arbitration.

[6, 7] The policy further provided "no insurance attaches in excess of three-fourths of the actual cash value," and "that the insurance asked for does not exceed seventy-five per cent of the cash value of each item thereof." The purpose of such provision is to protect the insurer by removing temptation from the insured to carry full value on the property and then cause it to be burned. McCollough v. Home Ins. Co., 155 Cal. 659, 102 P. 814, 18 Ann.Cas. 862. This reasoning, however, would apply only where there was a total loss in the property insured, but where, as here, the amount of the loss was far below the value of the property, we can see no reason for the application of this provision. In the cases cited by appellant an examination reveals that the court was in each, considering the question of total loss where they applied similar provisions of a policy.

In the consideration of this cause we have not overlooked the decision of this court in the recent case of Wilson v. Maryland Casualty Co. of Baltimore, 65 P.(2d) 903, but a consideration of the facts in that case show that the circumstances involved herein are readily distinguishable, and therefore that the Wilson Case cannot be considered as controlling.

The judgment appealed from is affirmed.

We concur: THOMPSON, J.; PLUMMER, J.

21 Cal.App.2d 103

In re CHILDS' ESTATE.

CHILDS v. HICKS et al.

Civ. No. 11463.

District Court of Appeal, Second District, Division 2, California.

May 20, 1937.

Hearing Denied by Supreme Court July 19, 1937.

1. Descent and distribution ⇐47(1)

Statute giving the same share in estate as if testator had died intestate to child or "issue of any deceased child" unintentionally omitted from will, whether born before or after making of will or before or after death of testator, *held* not to entitle granddaughter living at execution of testatrix' will dividing estate into six equal shares, giving one share to each of four living children and two shares to children of testatrix' deceased children per stirpes, to receive, in addition to share of her father who was living at execution of will but not at testatrix' death, an additional share as a pretermitted grandchild; quoted phrase referring only to issue of children dying before execution of will (Probate Code, § 90).

[Ed. Note.—For other definitions of "Issue (Descendants)," see Words & Phrases.]

2. Evidence ⇐65

Testatrix was presumed to have known that, under statute in force when she made will, that son's daughter living at execution of will would receive share left to son if son should predecease testatrix (Probate Code, § 92).

Appeal from Superior Court, Los Angeles County; Arthur Keetch and Charles E. Haas, Judges.

Proceeding in the matter of the estate of Emeline Childs, deceased, wherein Emeleen Bate Childs filed a petition to determine heirship, which was opposed by Carrie M. Hicks and others. From the judgment, the petitioner appeals.

Affirmed.

Meserve, Mumper, Hughes & Robertson, of Los Angeles (Roy L. Herndon, of Los Angeles, of counsel), for appellant.

Burr & Smith, of Los Angeles, for respondents.

WOOD, Justice.

The petitioner, Emeleen Bate Childs, granddaughter of Emeline Childs, deceased, appeals from a judgment and decree in proceedings to determine heirship. Emeline Childs executed her will on September 24, 1932, dividing her estate into six equal shares and leaving one share to each of her four living children and the remaining two shares to the children of her two deceased children per stirpes. Petitioner, who was living at the time of the execution of the will, is the daughter of Ozro W. Childs, one of the four children of the testatrix living when the will was executed. Ozro W. Childs predeceased the testatrix. Petitioner contends that she is entitled to receive, in addition to the share which would have been received by her father, an additional share as a pretermitted grandchild.

Before the adoption of the Probate Code, situations such as the present one were governed by sections 1306, 1307, and 1309 of the Civil Code. Section 1307 provided: "When any testator omits to provide in his will for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, as the same share in the estate of the testator as if he had died intestate, and succeeds thereto as provided in the preceding section." This section was construed in Re Estate of Barter, 86 Cal. 441, 25 P. 15, 16. In that case the testator expressly disinherited a daughter who died after the execution of the will but before the death of the testator. It was held that the children of the daughter had no rights in the estate, notwithstanding they were not mentioned in the will. In holding that the children of the deceased were not "the issue of any deceased child," the court said: "The object of that section is not to protect any grandchildren except those who, as presumptive heirs at law, would be entitled, had no will been made, to inherit at the time the will is published and made. That is the time when the children of the testator or the children of a deceased child are supposed, if not mentioned in the will, to have been omitted by oversight, because, at such time, their mother being dead, they would be presumptive heirs at law of their grandfather." The Barter Case was followed in Re Estate of Ross, 140 Cal. 282, 73 P. 976.

[1] The sections of the Civil Code above referred to were repealed upon the adoption of the Probate Code in 1931. The case be-

fore us is governed by sections 90 and 92 of the Probate Code. Section 90 of the Probate Code is as follows: "When a testator omits to provide in his will for any of his children, or for the issue of any deceased child, whether born before or after the making of the will or before or after the death of the testator, and such child or issue are unprovided for by any settlement, and have not had an equal proportion of the testator's property bestowed on them by way of advancement, unless it appears from the will that such omission was intentional, such child or such issue succeeds to the same share in the estate of the testator as if he had died intestate." It will be noted that in section 90 after the words, "or for the issue of any deceased child," there appear the words, "whether born before or after the making of the will or before or after the death of the testator." It is now argued that these words, which do not appear in the repealed sections of the Civil Code, bestow upon petitioner the right to take a share of the estate as a pretermitted grandchild as well as the share which was expressly left to her father. We see nothing in these additional words which broaden the rights of petitioner. As pointed out in the Barter Case the words, "the issue of any deceased child," refer only to the issue of children who may have died before the time of the execution of the will. Nothing is contained in the sections of the Probate Code which indicate that a construction should be placed upon these words different from the construction which had been placed upon section 1307 of the Civil Code. To reach this conclusion it need not be held that the additional words inserted in section 90 are without significance. These words might serve to give protection to a grandchild born after the execution of the will whose parent was dead at the time of its execution.

[2] It is provided in section 92 of the Probate Code that if an estate is left to any kindred of the testatrix and the devisee or legatee dies before the testatrix leaving lineal descendants, such descendants take the estate given by the will in the same manner as the devisee or legatee would have done had he survived the testatrix. Under the provisions of this section petitioner has been accorded by the decree of the trial court the one-sixth share in said estate which was devised and bequeathed to her father. The Probate Code became effective in August, 1931, and the will was executed more than a year later. The testatrix is presumed to have known and had in mind the law in force when she made her will. In re Estate of Walker, 196 Cal. 323, 237 P. 1070. She is presumed to have known that in case of the death of her son petitioner would receive her father's share in the estate. It may well be argued that the testatrix did not omit to provide for petitioner, who has in fact succeeded "to the same share in the estate of the testatrix as if she had died intestate."

The judgment is affirmed.

We concur: CRAIL, P. J.; McCOMB, J.



BROWN v. REGAN et al. *

Civ. 11337.

District Court of Appeal, Second District, Division 2, California.

May 13, 1937.

Rehearing Denied June 12, 1937.

Hearing Granted by Supreme Court July 12, 1937.

1. Appeal and error ⇐999(1)

Verdict and judgment based thereon should not be disturbed by reviewing court if they may be sustained on any reasonable theory.

2. Automobiles ⇐247

In pedestrian's action for injuries sustained when struck by automobile driven by minor son of owner with permission of owner, who had signed application of son for operator's license, finding for pedestrian and against son in the sum of "Nothing Dollars," and against owner in sum of $5,000, *held* sufficient to justify entry of judgment against owner, as against contention that verdict against owner could not be in a greater sum than that awarded against son (Civ.Code § 1714¼; Code Civ. Proc. § 626; St.1929, p. 522, § 62; Const. Cal. art. 6, § 4½).

3. Automobiles ⇐217(2)

Statute providing that, where traffic is controlled by traffic control signals or by police officers, pedestrian shall not cross roadway against a red or stop signal and shall not cross at any place except at crosswalk between adjacent intersections so controlled, is intended to make crossing be-

*For subsequent opinion see 75 P.2d 1063.

tween intersections unlawful only where traffic control signals are in operation (St. 1931, p. 2127, § 131½(d).

4. Automobiles ⇐245(72)

Pedestrian *held* not contributorily negligent as a matter of law so as to preclude recovery for injuries sustained when he was struck by automobile, while crossing street between intersections at which traffic control signals were placed, because he was not crossing in a crosswalk, in absence of evidence that control signals were in operation at time of accident (St.1931, p. 2127, § 131½(d).

McCOMB, J., dissenting.

Appeal from Superior Court, Los Angeles County; Francis J. Heney, Judge.

Action by Lansing Brown against William Regan and F. F. Regan. From an adverse judgment, the defendant, F. F. Regan, appeals.

Affirmed.

W. I. Gilbert, of Los Angeles, for appellants.

Sidney A. Moss, of Los Angeles (Henry H. Childress, of San Francisco, of counsel), for respondent.

WOOD, Justice.

Defendant F. F. Regan appeals from a judgment in the sum of $5,000 entered upon the return of a jury's verdict. On June 28, 1935, plaintiff, a pedestrian, was in the act of crossing Western avenue in the city of Los Angeles when he was struck by a car owned by defendant F. F. Regan and driven by his minor son Wm. Regan with the permission of the father, who had signed the application of the son for an operator's license. Plaintiff suffered serious injuries which, according to the complaint and the implied finding of the jury, were caused by the negligence of Wm. Regan in driving the car. The jury brought in a verdict in the following words: "We, the jury in the above entitled action, find for the plaintiff Lansing Brown and against the defendant Wm. Regan and fix the damages in the sum of Nothing Dollars ($) and against the defendant F. F. Regan the father in the sum of 5,000 Dollars ($). This 7th day of October 1936. G. W. Adams, Foreman." Thereupon counsel for plaintiff asked that further instructions be given to the jury and that the jury be ordered to pass upon the question of the liability of Wm. Regan. This request was refused and upon the insistence of counsel for the defense the verdict was filed. Thereupon counsel for F. F. Regan moved the court for a judgment in favor of F. F. Regan notwithstanding the verdict. This motion was denied.

Appellant contends that the verdict against F. F. Regan cannot be in a greater sum than that awarded against the driver of the car. The liability of appellant is fixed by section 62 of the California Vehicle Act (St.1923, p. 532, § 62, as amended by St.1929, p. 522) and section 1714¼ of the Civil Code, as these sections were in force at the time of the accident. In Broome v. Kern Valley Packing Co., 6 Cal. App. (2d) 256, 44 P.(2d) 430, 431, it was alleged in the second cause of action that the driver of the car, Robert Little, was operating it with the permission of the owner, the claim being based upon section 1714¼ of the Civil Code. The verdict was for $5,000 against the owner of the car, but the jury "rendered no verdict as to the defendant Robert Little." In affirming the judgment the court said: "While the liability imposed by this section of the Code upon the owner of an automobile may be secondary as between such owner and the person operating the car with his permission, it is a primary and direct liability and not a secondary one in so far as the injured party is concerned. * * * Where a parent signs a minor's application for a license, he becomes jointly and severally liable and a failure to find against a minor in such a case does not release the parent from the direct liability he has assumed by his contract." In Bosse v. Marye, 80 Cal.App. 109, 250 P. 693, 696, the plaintiff sued both the driver and the owner of the car, whose liability was incurred by reason of his having signed the application for the issuance to his daughter of a license under the provisions of the California Vehicle Act which, as in force at the time, made the parent liable for the negligence of the minor. The jury returned a verdict against the parent but found no verdict as to the daughter. No request was made by either of the parties for a resubmission of the cause to the jury for further action. In affirming the judgment against the parent the court said: "The effect of the issuance of the operator's license to Claudine Spreckels upon the application of appellant, pursuant to the provision of the Motor Vehicle Act men-

tioned, was to charge appellant with joint and several liability for actionable negligence on her part while operating a motor vehicle on a public highway. Idemoto v. Scheidecker, 193 Cal. 653, 226 P. 922. It was optional with plaintiff whether he sued one or both for the tort committed (Fimple v. Southern Pacific Co., [38 Cal.App. 727, 177 P. 871], supra); but having sued both, appellant as principal was nevertheless liable severally."

[1, 2] If the verdict of the jury and the judgment based thereon may be sustained on any reasonable theory, it should not be disturbed by the reviewing court. Rocha v. Garcia, 203 Cal. 167, 263 P. 238. A judgment should not be set aside for an error which has not resulted in a miscarriage of justice. Const.Cal., art. 6, § 4½. Considering the verdict in the light of these rules and of the two decisions above referred to we have reached the conclusion that the judgment should be affirmed. No special form for verdicts is prescribed by the Code of Civil Procedure. It is provided in section 626 that, "When a verdict is found for the plaintiff in an action for the recovery of money * * * the jury must also find the amount of the recovery." The jury did not exonerate the driver, Wm. Regan. It found "for the plaintiff Lansing Brown and against the defendant Wm. Regan." The jury also found against the defendant F. F. Regan in the sum of $5,000. These findings are sufficient to justify the entry of the judgment against F. F. Regan. By its verdict the jury made findings in favor of plaintiff on the issues of negligence and contributory negligence and determined the amount of the damages which F. F. Regan should pay. The liability of Wm. Regan was established, but the jury failed to find the amount which Wm. Regan should pay as a result of his liability. The liability of F. F. Regan being joint and several, he was not prejudiced as between him and the plaintiff by the failure of the jury to fix the amount of the damages as regards Wm. Regan and he has not appealed as to the defendant Wm. Regan. Plaintiff alone is in position to claim prejudice by reason of such failure. It is not questioned that plaintiff suffered serious injury, his hospital and medical expenses having amounted to a very considerable sum. In view of all the evidence it cannot be reasonably argued that the jury meant to find that plaintiff had suffered no damages whatever. Appellant refers to opinions of this court heretofore filed in which statements have been made to the effect that in cases within section 1714¼ damages must be in the same amount against the owner and the operator of the car. The facts of the cases referred to were different from those of the present case, and the statements made were unnecessary to the disposition of the appeals.

[3, 4] Appellant contends that plaintiff was guilty of contributory negligence as a matter of law. The accident occurred at about 1:30 o'clock in the morning on Western avenue between Sixth street and Wilshire boulevard. At the time of the accident there were in place traffic control signals at the intersections of Western avenue with Sixth street and Wilshire boulevard. It is provided in section 131½ (d) of the California Vehicle Act (St.1923, p. 517, § 131½ (d), as added by St.1931, p. 2127) as follows: "At intersections where traffic is controlled by traffic control signals, or by police officers, pedestrians shall not cross the roadway against a red or stop signal, and between adjacent intersections so controlled shall not cross at any place, except in a marked or unmarked crosswalk." Plaintiff was not crossing in a crosswalk. Appellant argues that he sustained the burden of proving contributory negligence by showing that plaintiff in crossing the street did so in violation of the provisions of the section just quoted. It will be noted that the section did not make it unlawful to cross between intersections where traffic control signals had been erected or were in place. It was made a violation of the act for pedestrians to cross against a red signal "where traffic *is* controlled by traffic control signals," and it was made unlawful to cross except at a crosswalk "between adjacent intersections *so controlled.*" The Legislature evidently intended to make crossing between intersections unlawful only in cases where traffic control signals were in operation. It was not proved that the control signals were in operation at the time of the accident.

The judgment is affirmed.

I concur: CRAIL, P. J.

McCOMB, Justice (dissenting).

I dissent. As appears from the facts stated in the majority opinion, there was a single tort for which both defendants were liable, defendant F. F. Regan's liability being based upon section 1714¼ of the Civil Code (now section 402 of the Vehicle Code, St. 1935, p. 153); in other words, defend-

ants were joint tort-feasors. The jury returned a verdict assessing the damage as to defendant William Regan in the "sum of nothing" and as to the defendant F. F. Regan in the sum of $5,000. We have, therefore, squarely presented for determination this question:

In an action against two persons for a single tort is a verdict assessing damage in different amounts as to each defendant valid?

In my opinion this question has been answered in the negative by our Supreme Court. In Marriott v. Williams, 152 Cal. 705, at page 711, 93 P. 875, 878, 125 Am. St.Rep. 87, Mr. Justice Shaw says:

"In actions against two or more persons for a single tort, there cannot be two verdicts for different sums against different defendants upon the same trial. There can be but one verdict for a single sum against all who are found guilty of the tort. All who are guilty at all are liable for the whole amount of the actual damages arising from the injury inflicted, irrespective of the degree of culpability. Huddleston v. Borough, 111 Pa. 110, 2 A. 200; McCool v. Mahoney, 54 Cal. [491] 492; Nichols v. Dunphy, 58 Cal. [605] 607; Everroad v. Gabbert, 83 Ind. [489] 492; Carney v. Reed, 11 Ind. 417; Cooley on Torts, p. 136; 1 Suth. Dam. § 140. The court did not err in instructing the jury to this effect."

In Bradford v. Brock, 140 Cal.App. 47, 50, 34 P.(2d) 1048, 1049, in discussing a verdict, assessing damages as a result of liability based on section 1714¼ of the Civil Code, the court says:

"Where a verdict is returned against the operator of an automobile for a sum less than $5,000 for injuries to one person, and the jury seeks to hold the owner for damages growing out of the same occurrence, under Civ.Code, § 1714¼, *its verdict against such owner must be in the same sum as against the operator.* Kerrison v. Unger [135 Cal.App. 607] 27 P.(2d) 927; Marriott v. Williams, 152 Cal. 705, 93 P. 875, 125 Am. St.Rep. 87." (Italics mine.)

In Kerrison v. Unger, 135 Cal.App. 607, 611, 27 P.(2d) 927, 928, in discussing the question of damages based on liability arising under section 1714¼ of the Civil Code, it is stated:

"In the instant case the jury had the right under the law and the evidence to bring in a verdict against the operator of the automobile for less than $5,000; but, if it did so, *under the clear terms of the statute the damages against the owners should have been in the same sum.*" (Italics mine.)

It is to be noted that in the two cases last cited a petition for hearing before the Supreme Court was denied.

For the foregoing reasons, in my opinion, the judgment should be reversed.



20 Cal.App.2d 740

JACKSON v. SHAW.

Civ. 1836.

District Court of Appeal, Fourth District, California.

May 10, 1937.

1. Bankruptcy ⇐433(7)

Debt on which judgment was rendered against defendant during bankruptcy proceedings remained same debt on which action was brought and which was provable in bankruptcy.

2. Bankruptcy ⇐391(1)

Suit which antedates an adjudication of bankruptcy, if not stayed, may, under Bankruptcy Act, proceed to judgment against bankrupt (Bankr.Act § 11a, 11 U.S.C.A. § 29(a).

3. Bankruptcy ⇐433(7)

Bankrupt, by failing to procure, under Bankruptcy Act, a stay of proceedings in action against him in state court, did not thereby forfeit his right to set up his discharge in bankruptcy as against an execution issued on judgment rendered in action in state court (Bankr.Act § 11a, 11 U.S.C.A. § 29(a).

4. Judgment ⇐153(2)

Judgment rendered in action in state court against bankrupt during bankruptcy proceedings could not, after discharge in bankruptcy, be set aside under provisions of statute permitting judgment taken through mistake, inadvertence, surprise, or excusable neglect to be set aside, where motion was not made within six months after judgment was taken, and where requirements of statute were not complied with by bankrupt

(Code Civ.Proc. § 473, as amended by St. 1933, p. 1851).

5. Bankruptcy ⇐433(7)

Statute permitting bankrupt who has been discharged from payment of a debt on which a judgment was rendered to have judgment discharged of record *held* not to authorize setting aside a judgment based on debt discharged in bankruptcy, where statute went into effect after judgment was entered, since statute is not retroactive (Code Civ.Proc. § 675b, as added by St.1935, p. 1921).

6. Bankruptcy ⇐433(7)

Judgment taken in action in state court against bankrupt during bankruptcy proceedings, and based on debt discharged in bankruptcy, could not thereafter be set aside (Bankr.Act, 11 U.S.C.A.).

Appeal from Superior Court, Fresno County; H. S. Schaffer, Judge.

Action by Lloyd Jackson, doing business under the firm name and style of the Crown Printing & Engraving Company, against G. H. Shaw. From an order setting aside a judgment and recalling an execution which had been issued, the plaintiff appeals.

Portion of order purporting to set aside judgment reversed, and portion recalling execution affirmed.

Lawrence W. Young, of Fresno, for appellant.

Frank H. Marvin, of Fresno, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order setting aside a judgment and recalling an execution which had been issued.

The plaintiff began an action on certain promissory notes in the superior court of Fresno county on September 25, 1934. Summons was served on the defendant in Contra Costa county on October 2, 1934. The defendant filed a petition in bankruptcy in a federal court, listing as a liability the claim involved here, and was adjudicated a bankrupt on November 1, 1934. No appearance was made in this action and no stay of proceedings in the state court was sought or obtained. A notice of the first meeting of the creditors of said bankrupt was mailed to the plaintiff and to his attorney. After receiving said notice and on November 16, 1934, the default of the defendant was entered and judgment was rendered in favor of the plaintiff. On August 3, 1936, the defendant was discharged in the bankruptcy proceedings. The defendant had no knowledge of this judgment until December 3, 1936, when an execution issued by the clerk was levied on wages due him from his employer. Thereupon he filed a motion to set aside the judgment and to recall the execution, which motion was granted, and the plaintiff has appealed from that order.

[1] The first question presented is whether a judgment rendered under these circumstances is enforceable by means of an execution. The debt on which the judgment was rendered remains the same debt on which the action was brought and which was provable in bankruptcy. Boynton v. Ball, 121 U.S. 457, 7 S.Ct. 981, 30 L.Ed. 985. The debt was therefore discharged unless this right was lost by the failure of the bankrupt to apply for a stay of the action, as permitted by that part of the Bankruptcy Act reading as follows:

"A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined." Bankr. Act. § 11a, 11 U.S.C.A. § 29 (a).

[2] The present Bankruptcy Act, unlike the act of 1867 (14 Stat. 517), does not contain a provision restraining a creditor from pursuing his claim against a bankrupt until the question of his discharge has been determined. It has been held both under the act of 1867 and under the present act that if it is not stayed a suit which antedates an adjudication of bankruptcy may proceed to judgment. In re Vadner (D.C.) 259 F. 614; Paggi v. Rose Manufacturing Co. (Tex.Civ.App.) 285 S.W. 852; Hill v. Harding, 107 U.S. 631, 2 S.Ct. 404, 27 L.Ed. 493; Chase v. Farmers', etc., Bank (C.C.A.) 202 F. 904. As pointed out in the last of these cases, the enforcement of the judgment thus ob-

tained in such an action presents a different question.

The Bankruptcy Act of 1867 contained a provision similar to the one with which we are here concerned, providing that "any such suit or proceedings shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge, provided there be no unreasonable delay on the part of the bankrupt," etc. Act Cong. March 2, 1867, § 21, 14 Stat. 526. In interpreting the act of 1867, it was held that the bankrupt could waive the clause just referred to and could permit the action in the state court to proceed to judgment, and that if he obtained his discharge after such a judgment was entered, he could produce such discharge before the state court and obtain a stay of execution. Boynton v. Ball, supra; Williams v. Humphreys, 50 N.J.Law, 500, 14 A. 583; Palmer v. Hussey, 87 N.Y. 303; Whyte v. McGovern, 51 N.J.Law, 356, 17 A. 957, 958. In the case last cited a judgment had been obtained under circumstances practically identical with those now before us and the judgment-creditor sought to obtain an execution, claiming the bankrupt had lost the benefit of his discharge by failing to ask for a stay of proceedings in the state court. The court pointed out that while a discharge obtained before judgment must be pleaded as a defense or it will be considered to have been waived and cannot avail the debtor in any proceeding on the judgment, a different situation prevails where the discharge was not obtained until after the judgment was entered. It was further pointed out that the cause of action is the same as before judgment and not a new debt, that the debt being provable the legal effect of the discharge is to release the debtor from liability thereon, that when no estoppel appears the debt is extinguished by the discharge, and that it follows that a discharge obtained after judgment is available on motion to set aside the execution. In that case, the court said:

"A discharge in bankruptcy granted after judgment is not a defense which arises or comes into existence pending the suit. It is a defense that gets its life from the fiat of the bankruptcy court, and, when the discharge is granted after judgment, the defense is wholly non-existent when the judgment is signed. The effect the discharge has upon the judgment is that which is given to it by relation under the provisions of the bankruptcy law. * * * A discharge in bankruptcy, unlike the bar of the statute of limitations, is a positive extinguishment of the debt, liability, or demand to which it applies. Nothing less than an express promise to pay can renew or revive the bankrupt's liability, and by statute the promise must be put in writing and signed by the party to be charged therewith. * * * The liability of a bankrupt for a debt from which he has been discharged cannot be renewed by implication. The defendant made the defense as soon as the plaintiffs moved to enforce their judgment, and in setting up the discharge as an answer to this suit the defendant was craving no indulgence from the court. He was simply availing himself of a defense secured to him by law."

The same rules have been applied under the Bankruptcy Act of 1898 (11 U.S.C.A.) in several cases. In Craig v. Cameron, 27 Ga.App. 455, 108 S.E. 828, 829, it was held that execution must be stayed in a suit started before bankruptcy proceedings were begun where judgment was entered before a discharge was obtained and where no notice of the bankruptcy proceedings or application for a stay was brought to the attention of the state court. The court largely followed the reasoning in Boynton v. Ball, supra, and quoted from that case as follows:

"If for any of these reasons, or for others, he permits the case to proceed to judgment in the state court, by failing to procure a stay of proceedings under the provisions of this section of the bankrupt law, or the assignee in bankruptcy does not intervene as he may do, * * * he does not thereby forfeit his right to plead his final discharge in bankruptcy, if he shall obtain it, at any appropriate stage of the proceedings against him in the state court. And if * * * his final discharge is not obtained until after judgment has been rendered against him in the state court, he may produce that discharge to the state court and obtain the stay of execution."

In Portwood v. Shafer, 33 Ga.App. 421, 126 S.E. 556, it was held that while it is better practice to ask the state court for a stay until the matter of the discharge of the bankrupt is determined in the bankruptcy court and to plead the discharge

when the same is granted, a bankrupt who obtains a discharge after judgment is entered is entitled to a perpetual stay of execution on the judgment although he did not ask for a stay in the state court before judgment was entered and although the ruling would be otherwise if the discharge had been granted before the judgment was rendered. In Badger v. Jordan Marsh Co., 256 Mass. 153, 152 N.E. 92, under facts almost identical with those now before us, the Supreme Court of Massachusetts held that where a debtor files a petition in bankruptcy while a suit against him in a state court is pending and schedules the claim upon which suit was brought, the state court may proceed to judgment unless the action therein is stayed; that the defendant in such an action, who has filed a petition in bankruptcy and scheduled the claim sued on, is under no duty to make application for a stay of proceedings therein; and that such a defendant's failure to seek a continuance of the action pending a termination of the bankruptcy proceedings, or failure to take action, after his discharge, to stay execution, does not preclude him from having the enforcement of the judgment enjoined in equity.

[3] Upon both principle and authority we conclude that, under the circumstances shown by the record, the respondent has not forfeited his right to set up his discharge in bankruptcy as against an execution issued upon this judgment, and that the motion to recall the execution was properly granted.

[4-6] The question remains whether the court had jurisdiction to set aside the judgment. This could not be done under the provisions of section 473 of the Code of Civil Procedure (as amended by St. 1933, p. 1851), both because of the lapse of time and because the moving party did not comply with the requirements of that section. Section 675b of the Code of Civil Procedure (as added by St.1935, p. 1921) has no application here. That section went into effect after this judgment was entered and it has been held that it is not retroactive. Harrlell v. Hoagland (Cal.App.) 64 P.(2d) 953. Also, the motion here involved was filed about four months after the discharge was granted. We know of no statute or rule of law authorizing the court to set aside a judgment under the circumstances here appearing. It would appear from the weight of authority from other jurisdictions that a judgment rendered under these circumstances is a valid judgment although it cannot be enforced by execution. With this limitation, arising from the effect of the provisions of the Bankruptcy Act, the respondent is entitled to his judgment for what it may be worth, and we can conceive of circumstances under which this right may be valuable. It follows that it may not be taken from him in the manner here attempted.

That portion of the order which purports to set aside the judgment is reversed and that portion of the order which recalls the execution is affirmed. Each party to pay his own costs.

We concur: MARKS, J.; JENNINGS, J.

KEY NUMBER SYSTEM

21 Cal.App.2d 73

In re LeSURE'S ESTATE.

LOCKWOOD et al. v. LeSURE et al.

Civ. 2020.

District Court of Appeal, Fourth District, California.

May 17, 1937.

Hearing Denied by Supreme Court July 15, 1937.

1. Wills ⇐289

In proceeding for probate of lost or fraudulently destroyed will, rejection of evidence tending to prove that testatrix herself had destroyed will did not relieve proponents of statutory burden to prove loss or fraudulent destruction (Probate Code, § 350).

2. Wills ⇐302(8)

In proceeding for probate of lost or fraudulently destroyed will, evidence *held* sufficient to sustain finding that testatrix had executed will, had thereafter taken and retained possession of will, and had destroyed it with intent to revoke.

3. Wills ⇐290

Will last seen and known to have been in decedent's possession, which cannot be found after death, will be presumed to have been destroyed by decedent with intent to revoke.

4. Wills ⇐386

Whether presumption of revocation of will which was known to have been in existence and in decedent's possession and could not be found after death was overcome by other evidence *held* for trial court as finder of facts.

5. Wills ⇐386

In proceeding for probate of lost or fraudulently destroyed will, weight of evidence and credibility of witnesses *held* for trial court (Code Civ.Proc. § 1847).

6. Wills ⇐384

In proceeding for probate of lost or fraudulently destroyed will, trial court's action in sustaining objections to questions designed to educe evidence showing friendly relationship between decedent and two sisters, who were principal beneficiaries, *held* not prejudicial, where record as a whole showed that decedent and sisters were always on friendly terms.

7. Wills ⇐384

In proceeding for probate of lost or fraudulently destroyed will, error, if any, in receiving evidence corroborating testimony of decedent's husband that decedent had burned will *held* harmless, where trial court left no doubt that it disbelieved husband's story and expressly found that decedent did not destroy will at time and in manner described by husband.

8. Wills ⇐384

In proceeding for probate of lost or fraudulently destroyed will, granting of motion to strike testimony relating to witnesses' conversations with decedent's husband and his conduct with reference to search for will which husband testified he knew had been destroyed by decedent *held* not prejudicial, where testimony was merely cumulative and corroborative of husband's admissions.

9. Appeal and error ⇐110

Order denying motion for new trial *held* not appealable.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Proceeding in the matter of the estate of Eva J. LeSure, deceased, wherein Ione T. Lockwood and another filed a petition for probate of a will, and wherein L. C. LeSure and others filed objections. From a judgment denying probate and from an order denying a motion for new trial, proponents appeal.

Judgment affirmed, and attempted appeal from order denying motion for new trial dismissed.

Harvey H. Atherton, of San Diego, for appellants.

T. A. Turner, of San Diego, for respondent L. C. LeSure.

Gray, Cary, Ames & Driscoll, of San Diego, for respondents Stephen Baxter, Fred A. Baxter, and Mrs. James S. O'Neill.

JENNINGS, Justice.

This is an appeal from a judgment denying probate to a will of Eva J. LeSure, deceased, as a lost or destroyed will and an attempted appeal from an order denying a motion for a new trial.

The procedural background of the action is as follows: On November 18, 1935, L. C. LeSure, the surviving husband of the above-mentioned deceased, filed a petition in the superior court alleging that Eva J. LeSure died intestate on November 11, 1935, leaving an estate in San Diego county which consisted of both real and personal property and praying for the appointment of petitioner's nominee, Iver Gellein, as administrator of the estate. On December 2, 1935, Iver Gellein and Ione T. Lockwood filed a petition with the court alleging that Eva J. LeSure died testate on November 11, 1935, leaving a will which had been lost or destroyed either in the lifetime of said decedent without her knowledge or consent or shortly after her death and praying for the issuance of letters testamentary to the petitioner Iver Gellein, who was alleged to have been named in the will as executor thereof. Thereupon a time was designated for hearing this petition and notice thereof was duly given. Prior to the hearing of the petition, L. C. LeSure filed an amended petition praying that letters of administration be issued to him, and two nephews and a niece of Eva J. LeSure filed objections to the granting of the Lockwood-Gellein petition alleging that said decedent died intestate.

The petitions thus filed together with the aforesaid objections came on for hearing before the court without a jury and at the conclusion thereof the court found that, during the latter part of the year 1934 Eva J. LeSure executed a will which was not revoked or destroyed by her and was

not destroyed or disposed of with her knowledge or consent during her life. The court further found that said will was last seen in the home of the testatrix and that it had been fraudulently and wrongfully concealed or destroyed by some one other than the testatrix either shortly before her death without her knowledge or consent or after her death. The court accordingly entered judgment whereby it was adjudged that Eva J. LeSure died testate and that the will be admitted to probate as a lost will. Thereafter L. C. LeSure and the above-mentioned objectors joined in a motion for a new trial which the court granted specifying in its order granting the motion that the only evidence which would be received on the rehearing should be such as would bear directly on the issue of whether or not the decedent had voluntarily destroyed her will during her lifetime or whether the will was in existence at the time she died or had been wrongfully or fraudulently concealed or destroyed by someone other than the testatrix without her knowledge or consent. It was further expressly provided in the order as a condition to granting the motion that it be stipulated between the parties to the contest that the evidence which had been received upon the former trial should remain as a part of the record and be considered by the court on the rehearing of the matter.

The retrial of the proceeding held under the conditions specified in the above-mentioned order resulted in the rendition of a judgment which decreed that the deceased died intestate and that the petition of Ione T. Lockwood and Iver Gellein for probate of the will alleged to have been lost or destroyed as aforesaid be denied. As a foundation for such judgment, the trial court found that Eva J. LeSure had executed a will as described in the petition for probate during the latter part of the year 1934 and that thereafter she took and retained possession of the instrument until she destroyed it with intent to revoke the same at some time between the middle part of September, 1935, and the date of her death, which was November 11, 1935. The court further expressly found that the will had not been lost or destroyed without the knowledge or consent of the testatrix.

The proponents of the will in due time presented a motion for a new trial which was denied and this appeal was thereafter perfected.

The principal contention advanced by appellants on this appeal is that the above-mentioned findings are lacking in evidentiary support. Concededly this familiar contention must be examined in the light of the established principle that the presence in the record of any evidence which lends support to the criticized findings precludes reversal of the judgment on the ground of evidentiary insufficiency.

In giving consideration to this contention, it must be borne in mind that the burden of proving that the will which appellants sought to have probated was either in existence at the time the testatrix died or had been fraudulently destroyed without the knowledge of the testatrix during her lifetime rested upon appellants as proponents of the will. Section 350 of the Probate Code so provides. Apparently there is no contention to the contrary. Having this point in mind, we may then proceed to an examination of the record for the purpose of discovering whether or not any evidence was submitted which may fairly be declared to lend support to the aforesaid findings which are attacked by appellants.

[1-4] The court expressly found that the will which appellants sought to have probated was executed by the deceased during the latter part of the year 1934. This finding is amply supported by the evidence and at no time during the trial was any contention to the contrary offered by respondents. The evidence also showed that after this will was executed the testatrix took it into her possession and that she thereafter retained possession of the instrument. Two witnesses testified that they saw the will on two different occasions prior to the death of the testatrix. These witnesses were L. C. LeSure and Elise Leabo. The former witness, who is the surviving husband of Eva J. LeSure, testified that he saw it at some time during the latter part of September or early in October, 1935. The latter witness, who was the housekeeper for the LeSures, testified that she saw the will on the day Eva J. LeSure went to the hospital where she died approximately a week thereafter. The testimony of this witness was so important to appellants' case that some reference to it is warranted. She stated that she assisted Eva J. LeSure in preparing for the trip to the hospital, that Eva J. LeSure was then sitting in her bed and requested the witness to bring her a certain black grip or valise which witness found in the closet of another bedroom in the house and brought to Eva J. LeSure, that the witness observed that Mrs. LeSure removed a number of

papers from the grip and placed them beside her on the bed, that the witness further observed that she took one of the papers in her hands and opened and read it, that the witness was able to see that this document was entitled "Last Will and Testament of Eva J. LeSure," that this title was written in longhand apparently with pen and ink, that after Mrs. LeSure had finished reading this paper she folded it and returned it to the grip which she then requested the witness to place in the closet and to lock the door thereof and remove the key therefrom. This witness also testified that some twenty or thirty minutes thereafter she had occasion to look in the grip and observed that there were papers in it. The witness further testified that later in the day L. C. LeSure returned from the hospital where he had gone with his wife and that he then went into the bedroom in whose closet the black grip had been placed, locked the door of the bedroom and remained in the room for about twenty minutes, came out and went to another part of the house where he remained for a time, then returned to the bedroom whose door he again locked and in which he remained for five or ten minutes. The witness also testified that she looked for the grip the following morning and being unable to find it inquired of LeSure where it was and was informed that he had removed it from the house for the purpose of having a key made for it. The witness further testified that a few days after this conversation she saw the grip in a closet in the bedroom occupied by LeSure.

With respect to the above-mentioned evidence, it may properly be observed that careful reading of the testimony indicates that this witness did not at any time identify the instrument which she stated she saw in the hands of the deceased on the day she went to the hospital as the will which appellants sought to have probated. In this connection it should also be noted that the attorney who drew the will whose probate was sought and the wife of this attorney who was one of the witnesses to the will testified positively that the will which was executed during the latter part of the year 1934 bore the title "Last Will and Testament" which was typewritten in large type, that the decedent's name did not appear in the title, and that no handwriting other than the signatures of the testatrix and the witnesses appeared in the will.

The witness L. C. LeSure testified positively that his wife, Eva J. LeSure, burned the 1934 will on a date which on the rehearing he fixed as being about the middle of September, 1935, under circumstances which he narrated. The testimony of this witness is the only evidence appearing in the record which directly and specifically tended to prove the destruction of the will that appellants sought to have probated. With respect to this portion of the testimony given by the witness, it may be remarked that the reading of it impels the observation that the story this witness told of the will's destruction was at least fantastic. Its oral recitation was apparently not more impressive since the trial court at the conclusion of the first hearing remarked that he simply could not give credence to the story of the will's destruction as related by this witness and there is an express finding which the court made at the conclusion of the retrial of the action that Eva J. LeSure did not destroy the will by burning it during the middle part of the month of September, 1935.

Counsel for appellants has seized upon this express rejection by the trial court of the only evidence which tended to show that the testatrix had herself destroyed the will animo revocandi as the foundation for his argument that no evidence was produced which sustains the attacked findings heretofore stated particularly that which finds that at some time between the middle part of September, 1935, and the date of her death the testatrix destroyed the will with intent to revoke it. Unfortunately for appellants, as heretofore pointed out, the burden of proving loss or fraudulent destruction of the testamentary instrument rested upon appellants. No burden rested on respondents to show that the testatrix herself destroyed the will and the trial court's rejection of the only evidence in the case that tended to prove this fact is of no assistance to appellants. Certainly they were not thereby relieved of the burden of proof which the law casts upon them in a proceeding of this character.

Examination of the record herein compels the conclusion that it may not be declared that the findings which appellants attack are so lacking in evidentiary support that the judgment rendered in conformity therewith must be reversed. In the first place, there is ample evidence that the testatrix took possession of the will after its execution and that she thereafter retained possession of it. There is also evidence that on a number of occasions after the 1934 will was executed the testatrix discussed with

the attorney who had drawn the will the matter of making a new will and expressed her dissatisfaction with some provisions of the 1934 will and on one occasion inquired of him as to what result would be achieved if she should destroy her will as to which he advised her. The witness B. E. Gray testified positively that on October 16, or 18, 1935, he had a conversation with Eva J. LeSure in which she said, "I destroyed my will. I have no will and I don't know whether I will make another one." Another witness, Adeline L. Holcomb, testified that she had a conversation with Eva J. LeSure during the first week in October, 1935, in which Mrs. LeSure made the statement that she had burned her will a few days prior to the date of the conversation.

The above-mentioned evidence is ample to sustain the finding that Eva J. LeSure herself destroyed the 1934 will animo revocandi at some time between the middle of September, 1935, and the date of her death. Furthermore, it must be borne in mind that there is a definite presumption which is applicable to a situation of the character which is here presented. This presumption is stated in Re Estate of Sweetman, 185 Cal. 27, 28, 195 P. 918, as follows: "A will last seen and known to have been in the possession of the decedent, which cannot be found after his death, will be presumed to have been destroyed by him with the intention of revoking it, since the law always presumes in favor of the innocence of an act, and any other inference would involve a finding of a wrongful or fraudulent destruction of the will by a third person." Language to the same effect is to be found in Re Estate of Johnston, 188 Cal. 336, 340, 206 P. 628; In re Estate of Ross, 199 Cal. 641, 646, 250 P. 676; In re Estate of Smith, 140 Cal.App. 508, 516, 35 P.(2d) 335; In re Estate of Allan, 15 Cal.App. (2d) 272, 276, 59 P.(2d) 425. Appellants maintain, however, that the presumption being disputable is evidence of the weakest and least satisfactory character and cite numerous authorities which thus characterize disputable presumptions generally. Sufficient answer to this argument is provided by the following quotation from In re Estate of Duffill, 14 Cal.App. (2d) 284, 285, 58 P.(2d) 185: "What the appellant seems to forget is that the presumption of revocation is in itself evidence of a substantial nature and that whether this presumption is overcome by other evidence depends upon the weight of the evidence. It is the province of the fact finder to determine where the preponderance of evidence lies, and this court on appeal will not substitute its opinion for that of the trial court as to the weight of the evidence where there is any substantial evidence to sustain the trial court's finding."

[5] Much of the argument of appellants relating to the matter which is now being considered is devoted to an attack on the credibility of various witnesses who testified on behalf of respondents and to an effort to sustain the contention that the preponderance of the evidence is against the disputed findings. Manifestly, it would be superfluous to insert in this opinion a citation of authorities in support of the familiar principle that the weight of evidence and the credibility of witnesses are matters which are confided exclusively to the determination of the trial court. The quotation included in the immediately preceding paragraph is apropos on the point of evidentiary preponderance. To the same effect is the text of the opinion in Re Estate of Ross, supra, 199 Cal. 641, at page 651, 250 P. 676. With respect to the matter of credibility the Code of Civil Procedure expressly declares that the trier of facts shall be the exclusive judge of the credibility of witnesses. Section 1847, Code of Civil Procedure. This settled rule is stated with a long line of supporting authorities in 27 California Jurisprudence at page 182.

Appellants further complain that the trial court committed prejudicial error in the reception of specified evidence and in rulings which it made sustaining objections to certain inquiries propounded to designated witnesses. It is also especially urged that the court committed reversible error in granting a motion of respondents whereby certain evidence which had been admitted during the course of the trial was stricken from the record.

[6] The inquiries to which it is claimed the trial court erroneously sustained objections were questions which were designed to educe evidence that would show the friendly and harmonious relationship which existed between the decedent and her two sisters who were the principal beneficiaries in the 1934 will. It is urged that the evidence thus sought to be developed was material and relevant in that it would have indicated the improbability of the testatrix having herself destroyed the will. It is contended that the court's action in sustaining objections to the inquiries improperly circumscribed appellants in their effort to

rebut the aforementioned presumption of destruction by the testatrix particularly in view of the fact that the court later admitted evidence submitted by respondents which tended to show that the deceased had made statements evidencing a hostile and suspicious attitude toward her sisters.

Examination of the record shows that the objections were sustained on the ground of immateriality because, as the court remarked, the testimony of L. C. LeSure theretofore given showed that the relationship between the decedent and her sisters was friendly and affectionate. While it must be conceded that the record indicates that the court's recollection of L. C. LeSure's testimony on this point was not strictly accurate, it was nevertheless the impression which the court had received and we are not disposed to declare that prejudicial error was committed in sustaining the objections in view of the court's twice-repeated statement to the effect that L. C. LeSure had theretofore testified as above indicated. Since the court had evidently recollected that LeSure had testified that aside from occasional quarrels the relationship between the testatrix and her sisters was friendly and affectionate no useful purpose could be served in producing further evidence to the same effect which in the court's mind would be purely cumulative. It should further be observed that at the time the rulings sustaining objections were made the only evidence which was then before the court that bore upon the matter of the feeling, friendly or otherwise, which the testatrix had for her sisters consisted of L. C. LeSure's testimony. Subsequently some evidence was received over objections urged by appellants which showed that at various times the testatrix had made statements which indicated that the relationship between her and her sisters was not entirely harmonious and that she entertained the opinion that the chief motive for whatever interest her sisters manifested in her was not sisterly affection but the hope and expectation that she would leave them the bulk of her estate. The reception of this last-mentioned evidence is urged as the principal basis for the contention that the court's action in sustaining objections to questions that would have elicited evidence showing that the testatrix had a friendly and affectionate regard for her sisters constituted an undue limitation on the right of appellants to show the improbability of the testatrix having herself destroyed her will, thereby materially reducing the amounts which she had provided her sisters should receive from her estate.

There are several answers that suggest themselves to this contention. Appellants have themselves indicated one that is sufficient in pointing out that "the testimony is very definite and conclusive that Mrs. LeSure and her sisters were always on the most friendly terms" and in citing evidence to this effect which was produced during the trial. It is apparent therefore that the complaint of appellants with regard to undue limitation is not sustained when the record as a whole is considered. Appellants were permitted to show by the testimony of numerous witnesses without objection that the relationship which existed between testatrix and her sisters was most friendly and harmonious. We conclude, therefore, that no prejudicial error was committed by the court in making the rulings of which appellants complain.

[7] The evidence which it is contended the trial court erroneously admitted consists of the testimony of T. A. Turner, the attorney who prepared the will which appellants sought to have probated. This witness was permitted to testify over objection of appellants that at some time about the middle of October, 1935, L. C. LeSure had stated to him that the testatrix, Eva J. LeSure, had burned the 1934 will. A voluntary statement of the witness Turner to the effect that on the day following Eva J. LeSure's arrival at the hospital in November, 1935, L. C. LeSure told him about the destruction of the will was also allowed to stand over objection by appellants. It is urged that this evidence consisted of self-serving declarations of L. C. LeSure and was therefore incompetent and its reception prejudicially erroneous.

It is unnecessary to decide whether or not this evidence was improperly received. It must be remembered that L. C. LeSure testified positively that his wife burned the will at a certain time and that no other witness gave any testimony relative to the destruction of the will by the testatrix. The evidence of whose admission appellants complain related exclusively to L. C. LeSure's explanation of the destruction of the will by the testatrix and its only purpose was to corroborate LeSure's testimony on this point. However, the trial court, as above noted, left no doubt that it disbelieved the story related by LeSure on the witness stand with respect to the destruc-

tion of the will and made an express finding that the testatrix did not destroy the will at the time and in the manner described by him. Assuming then that appellants are correct in their contention that the corroborative evidence was improperly received, it is manifest that the error thus committed was harmless and should be disregarded on this appeal.

[8] The same process of reasoning is applicable to the contention of appellants that the trial court erroneously granted a motion of respondents to strike from the record certain testimony given by designated witnesses. It may be assumed without deciding the point that the court erred in granting the motion. Examination of the transcript, however, reveals that the witness L. C. LeSure himself admitted the truth of the testimony of the witnesses regarding various conversations which they had with him and the statements which he made during these conversations and his peculiar conduct with reference to his alleged search for a will which he testified he knew had been destroyed by the testatrix. The evidence which was stricken from the record related to these matters. Since the record shows that the witness LeSure expressly admitted that he had the conversations and made the statements attributed to him and that he had indulged in the strange conduct of pretending to search for a will which according to his own story he knew was no longer in existence, it is not conceivable that appellants could have been prejudiced by the court's action in striking from the record evidence which was merely cumulative and corroborative of LeSure's admissions. In so holding, it should be observed that the evidence was stricken only as to the objectors and respondents, Stephen Baxter, Fred A. Baxter, and Mrs. James S. O'Neill and that the trial court expressly ruled that the evidence had a direct bearing on the credibility of L. C. LeSure and that as to him it should remain in the record and be considered in connection with the important feature of his credibility. There is, of course, no complaint by appellants that the trial court was not entitled to consider the stricken evidence as bearing on L. C. LeSure's credibility.

[9] Being persuaded that no reversible error was committed by the trial court in its rulings with respect to the admission and rejection of evidence and that it may not be declared that the findings which appellants attack are lacking in evidentiary support, it follows that the judgment from which this appeal has been taken must be affirmed. Since no appeal lies from an order denying a motion for a new trial, the attempted appeal from such order is dismissed.

The judgment is therefore affirmed.

We concur: BARNARD, P. J.; MARKS, J.



24 Cal.App.2d Supp. 757

HUMMINGBIRD v. SCHURICH.

Civ. A 3635.

Appellate Department, Superior Court, Los Angeles County, California.

May 8, 1937.

1. Innkeepers ⇐11(12)

Evidence whether hotelkeeper, sued for loss of suitcase which departed guest left with hotelkeeper for safekeeping, pending guest's return, exercised ordinary care in storing suitcase, *held* for jury.

2. Innkeepers ⇐11(3)

Hotelkeeper storing suitcase of departed guest without stated charge, pending guest's return, was "depositary for hire" and not "gratuitous depositary," and hence under statutes had duty of exercising ordinary care, and not merely slight care, for preservation of suitcase (Civ.Code, §§ 1846, 1852, 1859).

[Ed. Note.—For other definitions of "Depositary for Hire" and "Gratuitous Deposit," see Words & Phrases.]

Appeal from Municipal Court of Los Angeles; May D. Lahey, Judge.

Action for damages for loss of property by Mavra Hummingbird against William Schurich. From a judgment for the plaintiff and from an order denying a motion for a new trial, the defendant appeals.

Judgment affirmed, and appeal from order dismissed.

Scott & Eberhard, of Los Angeles, for appellant.

Joe H. Kirby, of Los Angeles, for respondent.

SCHAUER, Judge.

On February 19, 1936, plaintiff, who was then and for some days had been a guest in defendant's hotel, wishing to take a trip of several days' duration but expecting to return after such period and resume the relation of guest with defendant innkeeper, checked out, paying his bill in full, but at the time of departure left with defendant, and defendant (through an authorized employee) accepted, for safekeeping and delivery to plaintiff upon his return, without any stated consideration for such bailment, a suitcase and contents having a value in excess of $50. On February 23, 1936, plaintiff, having returned and again registered as a guest at defendant's hotel, demanded his suitcase and its contents, but without avail, being then informed by defendant's representative that the same had disappeared. Neither the case nor any of its contents has ever been returned to plaintiff and, after a further demand upon defendant, this action was brought to recover the value of the lost property. From a judgment for plaintiff defendant appeals.

[1] The complaint alleges, among other things, that "the defendant was guilty of negligence in caring for the plaintiff's property in that he did not put said property under lock and key as he agreed to do; did not prevent strangers from having access to it, and did not adequately protect or secrete it." The evidence is not insufficient in law to support the implied finding of the trial court that the foregoing allegation is true. It discloses that the suitcase was placed in a linen closet which was readily accessible to any one entering or leaving the hotel, unless the door thereof was locked; that the door thereof was left unlocked on some occasions; and that when it was locked the key to it was kept in an unlocked fuse box, which fuse box was also observable by and readily accessible to all who might be entering or leaving the hotel. It was testified that hotel maids "three or four times" each day, Rep.Tr. p. 51, lines 9–11, took the key from the fuse box, unlocked the linen closet, extracted linen therefrom or changed their clothes therein, relocked the door and returned the key to the unlocked fuse box, all of this in such a position that "Every guest in the hotel, walking up for instance, could see you [the maid] putting that key in this box." Rep.Tr. p. 51, lines 19–21. Such evidence under the allegations of the pleadings, if ordinary care was the measure of defendant's duty, presented a question of fact as to his negligence, the determination of which in the trial court is conclusive upon appeal. The question is: for what degree of care is defendant responsible?

[2] Section 1859 of the Civil Code of California declares that the "liability of an innkeeper * * * for losses of or injuries to personal property, is that of a depositary for hire; provided, however, that in no case shall such liability exceed the sum of * * * fifty dollars for each valise or traveling bag and contents * * * unless he shall have consented in writing with the owner thereof to assume a greater liability." The quantum of care required of a depositary for hire is "at least ordinary care for the preservation of the thing deposited." Section 1852, Civ. Code. Defendant, however, contends that the bailment was created and that plaintiff's suit case and contents disappeared, at a time when the relation of innkeeper and guest was, between them, nonexistent; that by accepting the bailment under the circumstances related he became only a "gratuitous depositary" whose responsibility may be discharged by "slight care for the preservation of the thing deposited." Section 1846, Civ.Code.

We conclude that it is immaterial whether the relation of innkeeper and guest was existent at the precise time involved; that in any event the bailment was for the mutual benefit of plaintiff and defendant and hence constituted defendant a depositary for hire. It was of obvious convenience to plaintiff because it relieved him of the necessity and possible expense of carrying the deposited property about with him or elsewhere storing it; likewise clear is the interest and expected benefit of the defendant: the storage of his former guest's property without a stated compensation was a service which was likely to bring that person to return again as a paying guest. In Hotels Statler Co. v. Safier (1921) 103 Ohio St. 638, 134 N.E. 460, 22 A.L.R. 1190, the Ohio Supreme Court held that the storage of a trunk, under circumstances not dissimilar to those of the instant case, was for the mutual benefit of both the hotelkeeper and his former (and to be hoped future) guest and that the relation and obligations of the

hotelkeeper in the premises were those of a depositary for hire.

While we have found the report of no case decided by a court of last resort in California in which the question involved was identical with that passed on by the Ohio Supreme Court in the case last cited and which question is presented here, we do find analogically comparable rulings in such cases as Crawford v. Foster (1930) 110 Cal.App. 81, 293 P. 841, and Woodman v. Hemet U. H. School Dist. (1934) 136 Cal.App. 544, 29 P.(2d) 257. In Crawford v. Foster (which was followed in the later case) the court was called upon to determine whether a person was a "passenger" or a "guest" within the meaning of a statute (section 141¾ of the former California Vehicle Act, as amended in 1929) exempting the owner and operator of an automobile from liability to a "guest" for injuries occasioned by simple negligence in operation of the automobile. The statute defined the word "guest" as being "a person who accepts a ride in any vehicle without giving compensation therefor." Stats.1929, p. 1580. Plaintiff (in the reported case) was injured while riding in an automobile which was being demonstrated for possible sale to herself and her husband. The court, in holding that she was not a "guest" within the purview of the statute, said (110 Cal.App. 81, at pages 84, 85, 293 P. 841, 842): "Automobile dealers and salesmen are not only willing but anxious to exchange their time and the use of a car for the time and attention of a person who is in the market for such a car. There can be no question that in actual business the one is regarded as an equivalent or recompense for the other. * * * The taking of a demonstration of an automobile, with its accompanying possibilities of profit, would not only seem to be a benefit to the dealer, but a return fully proportionate to any benefit conferred on the prospect. * * * The relationship between the parties here is not entirely dissimilar to that existing between the owner of a store and a customer using an elevator therein." The court then quoted from and cited Champagne v. Hamburger & Sons (1915) 169 Cal. 683, at pages 692, 693, 147 P. 954, 958, in which it was held that a store owner who operated an elevator for the convenience of his customers and prospective customers was "within the category of a carrier of passengers for hire and subject to the same duties and responsibilities." The Supreme Court in this case expressly held against the store owner's contention that since he charged no fare as such, for riding in his elevators, and since riding in them was a convenience to such persons as chose to use them, he was, within the scope of Civ. Code, § 2096, "a carrier of persons without reward" and hence liable only for failure to use ordinary care rather than that highest degree of diligence exacted from carriers for hire.

We do not regard Pawn v. Wall (1928) 88 Cal.App. 597, 264 P. 268, which was decided solely upon the ground that the cause of action therein sued on was barred by the statute of limitations, as being determinative of any consideration pertinent to the case at bar. Our conclusion to adopt in California the rule declared by the Ohio Supreme Court in Hotels Statler Co. v. Safier (1921) supra, 103 Ohio St. 638, 134 N.E. 460, 22 A.L.R. 1190, is consistent with the trend already established and illustrated in the local cases cited. The hotel proprietor who stores the luggage of his departed guest without stated charge, pending the anticipated return of such former (and then and thereby being solicited future) guest, is no more gratuitous in his capacity as a depositary than is the elevator-operating storekeeper rewardless in his role as a carrier of passengers. The depositor who is a guest and the passenger who is a customer pay for the service provided, even though no charge therefor appears in any statement rendered.

The judgment is affirmed, respondent to recover his costs of appeal. The appeal from the order denying motion for a new trial (a nonappealable order) is dismissed.

We concur: SHAW, P. J.; SHINN, Judge pro tem.

23 Cal.App.2d Supp. 745

GARDENSWARTZ v. EQUITABLE LIFE ASSUR. SOC. OF THE UNITED STATES et al.

EQUITABLE LIFE ASSUR. SOC. OF THE UNITED STATES v. GARDENSWARTZ et al.

Civ. A 3593.

Appellate Department, Superior Court, Los Angeles County. California.

April 12, 1937.

Rehearing Denied April 27, 1937.

As Modified May 4, 1937.

1. Judgment ⇐185

Affidavit filed by insurer *held* insufficient to defeat motion for summary judgment in action on disability policies, where affidavit stated contents of certain writings by giving their purport, but not their words, and hence, did not comply with statute in that no showing of competency was made (Code Civ.Proc. § 437c, as added by St.1933, p. 1848).

2. Judgment ⇐185

To make an affidavit in opposition to motion for summary judgment sufficient under statute as to any writing to be shown thereby, unless such affidavit shows a case where statute authorizes a different course, affiant must attach original of such writing, or possibly attach to or set forth in affidavit a verified or certified copy of writing (Code Civ.Proc. § 437c, as added by St.1933, p. 1848).

3. Judgment ⇐185

Affidavit filed by insurer *held* insufficient to defeat motion for summary judgment in action on disability policies, where affidavit set forth statements alleged to have been made by persons other than affiant or any party to action, and only one of persons was named, and statements of others were lumped together as one general allegation, all of which was hearsay, and affidavit did not state that affiant personally knew that persons refused to make affidavits (Code Civ.Proc. § 437c, as added by St.1933, p. 1848).

4. Judgment ⇐185

Defendant requesting court to deny motion for summary judgment, notwithstanding defendant is unable to make statutory showing in opposition to motion, should at least present affidavit by some one who states of his own knowledge that other persons know or claim to know facts and have refused to make affidavits, and affidavit should name other persons and set forth what each one knows or claims to know, in manner similar to affidavit for continuance on ground of absence of witnesses (Code Civ.Proc. § 437c, as added by St.1933, p. 1848).

5. Judgment ⇐185

Summary judgment for plaintiff cannot be ordered, notwithstanding affidavits for defendant be insufficient or absent, unless plaintiff presents affidavits in support of his motion which comply with statute and show that he is entitled to judgment (Code Civ. Proc. § 437c, as added by St.1933, p. 1848).

6. Judgment ⇐185

Insured's affidavit in support of motion for summary judgment in action on disability policies, which affidavits stated provisions of policies by their legal effect only without any showing to excuse production of originals, *held* insufficient, if any showing of provisions of policies was required (Code Civ.Proc. § 437c, as added by St.1933, p. 1848).

7. Judgment ⇐185

Insured's affidavit in support of motion for summary judgment in action on disability policies *held* not insufficient because affidavits set forth provisions of policies by their legal effect only without any showing to excuse production of originals, where insurer's answer set forth exact language of policies and denied execution thereof in any other terms, and there was no issue in pleading as to issuance of policies or their terms (Code Civ.Proc. § 462; § 437c, as added by St.1933, p. 1848).

8. Statutes ⇐225

Statute providing that affidavits in support of motion for summary judgment must contain facts sufficient to entitle plaintiff to a judgment in the action must be construed with other provisions of Code in pari materia, notwithstanding statute is a later enactment, and with rule in mind that repeals by implication are not favored (Code Civ. Proc. § 462; § 437c, as added by St.1933, p. 1848.)

9. Pleading ⇐377

Under statute providing that material allegations of complaint not controverted by answer must be taken as true, plaintiff need not prove a fact which is not controverted

by answer, and defendant cannot dispute such fact, nor can it be overcome, even by a contrary finding (Code Civ.Proc. § 462).

10. Judgment ⇐185

Purpose of affidavits on motion for summary judgment is only to show whether issues apparently made by formal pleadings are genuine, whether each party has competent evidence to offer which tends to support his side of the issue, and on hearing of such a motion, no issues are tried, but inquiry is limited to question whether there is an issue to be tried (Code Civ.Proc. § 437c, as added by St.1933, p. 1848).

11. Judgment ⇐186

If either party on hearing of motion for summary judgment finds that his pleading is inadequate, either by way of allegation or denial, court may and should permit party to amend, but in absence of request for amendment, there is no occasion to inquire about possible issues not raised by pleadings (Code Civ.Proc. § 437c, as added by St.1933, p. 1848).

12. Judgment ⇐185

Insured's affidavit *held* insufficient to support motion for summary judgment in action on disability policies, wherein insurer denied disability, where insured only averred that "affiant developed heart trouble and became wholly, totally, and presumably permanently disabled as defined in the aforementioned policies," all of which except statement as to development of heart trouble was a mere conclusion (Code Civ.Proc. § 437c, as added by St.1933, p. 1848).

13. Judgment ⇐185

Affidavit of insured's physician that insured had "coronary artery disease, osteoarthritis of the spine, and prostate obstruction" and that insured was "disabled and unable to engage in any occupation or perform any work for compensation of financial value," *held* insufficient to support motion for summary judgment in action on disability policies, since affidavit was directed to the ultimate fact in issue, and included a conclusion beyond field of medical science (Code Civ.Proc. § 437c, as added by St.1933, p. 1848).

14. Judgment ⇐185

Neither conclusions of law nor conclusions of fact, nor so-called ultimate facts, are sufficient to satisfy requirement of statute providing that affidavits presented on motion for summary judgment, whether by plaintiff or defendant, should set forth facts "with particularity" and show that facts are within personal knowledge of affiant, and that he can competently testify thereto if sworn as a witness, which statute requires presentation in affidavits of evidentiary facts sufficient to show a cause of action or a defense (Code Civ.Proc. § 437c, as added by St.1933, p. 1848).

15. Judgment ⇐185

Affidavits stating that insured had submitted on various dates notice of proof of disability, and that physician had given insurer notice of disability in writing, and that he had submitted further written reports concerning insured's disability, *held* insufficient to support motion for summary judgment in action on disability policies, wherein insurer denied that insured made due proof, where no copies of reports or notices were alleged in or attached to affidavits (Code Civ.Proc. § 437c, as added by St.1933, p. 1848).

16. Appeal and error ⇐133

Order directing entry of summary judgment *held* not appealable, since order for a summary judgment cannot be regarded as in itself a judgment, but merely directs what judgment shall be, and amounts to the rendition of a judgment, but it is not itself the judgment (Code Civ.Proc. § 983, as amended by St.1935, p. 1963).

On Petition for Rehearing.

17. Appeal and error ⇐901

Appellant has burden to show error.

18. Appeal and error ⇐934(1)

Insurer could not claim that portion of its affidavit which set forth a conversation with insured was sufficient to defeat insured's motion for summary judgment in action on disability policies, on ground that admissions made by insured in conversation supported affirmative defenses pleaded in answer that after policies had lapsed for nonpayment of premiums insured made material misrepresentations in applications upon which policies were reinstated, copies of which applications were attached to answer, since affirmative defenses are by statute deemed controverted without further pleading, and in absence of showing to contrary appellate court would presume that insured filed affidavit denying genuineness of applications (Code Civ.Proc. § 462; § 437c, as added by St.1933, p. 1848; § 448, as amended by St.1933, p. 2548).

19. Judgment ⇐185

As respects sufficiency of insurer's affidavit in opposition to insured's motion for summary judgment in action on disability policies, facts that policies had lapsed and that insurer relied on applications for reinstatement in reinstating policies would not be admitted by mere admission by insured of genuineness of applications for reinstatement (Code Civ.Proc. § 462; § 437c, as added by St.1933, p. 1848; § 448, as amended by St.1933, p. 2548).

20. Courts ⇐188(3)

Where complaint in action on disability policies stated a case within jurisdiction of municipal court, insurer's cross-complaint which pleaded insured's fraud in procuring policies and reinstatements, and which prayed for cancellation and reformation of certain provisions of policies, in so far as cross-complaint was directed at insured, *held* within jurisdiction of municipal court, since cross-complaint in effect stated merely equitable defensive matter (Code Civ.Proc. § 89, subd. 3, as added by St.1933, p. 1811).

21. Courts ⇐188(3)

In action commenced in municipal court on disability policies, mere filing by insurer of cross-complaint naming insured's wife as a cross-defendant for cancellation and reformation of certain provisions of policies did not oust municipal court of jurisdiction, where it did not appear that determination of action or cross-complaint would involve determination of question not within jurisdiction of municipal court (Code Civ.Proc. § 396, as amended by St.1935, p. 1947).

Appeals from Municipal Court of Los Angeles, Los Angeles County; Benjamin J. Scheinman, Judge.

Action on disability policies by Samuel B. Gardenswartz against the Equitable Life Assurance Society of the United States and others, wherein named defendant filed a cross-complaint against plaintiff, and another. From a judgment of the Municipal Court, and from an order granting plaintiff's motion to strike answer and cross-complaint of named defendant, named defendant appeals.

Appeal from order dismissed, and judgment reversed with directions.

Newlin & Ashburn and Ray J. Coleman, all of Los Angeles, for appellant.

Philip Goodman, of Los Angeles, for respondent.

SHAW, Presiding Judge.

Plaintiff made a motion for summary judgment under section 437c of the Code of Civil Procedure (as added by St.1933, p. 1848), which provides in part as follows: "when an answer is filed, * * * if it is claimed that there is no defense to the action, on motion of the plaintiff, * * * supported by affidavit of any person or persons having knowledge of the facts, the answer may be stricken out and judgment may be entered, in the discretion of the court, unless the defendant, by affidavit or affidavits shall show such facts as may be deemed by the judge hearing the motion sufficient to entitle him to defend." In support of his motion plaintiff presented two affidavits and defendant filed one affidavit in opposition. The motion was granted, and defendant appeals.

[1, 2] It is contended by plaintiff that the affidavit filed by defendant was insufficient to defeat the motion, and this contention must be sustained. Section 437c requires as to defendant's affidavits: "The facts stated in each affidavit shall be within the personal knowledge of the affiant, shall be set forth with particularity, and each affidavit shall show affirmatively that the affiant, if sworn as a witness, can testify competently thereto." The affidavit for defendant here states the contents of certain writings by giving their purport but not their words. This does not comply with the provision above quoted in that no showing of competency is made. As a witness the affiant could not competently give such testimony, over proper objection, there being no showing of loss of the writings or other circumstances which would excuse production of the originals. Code Civ.Proc. §§ 1855, 1937. A proper objection to such testimony would go to its competency. To make an affidavit sufficient under section 437c, as to any writing to be shown thereby, unless such affidavit shows a case where the other sections above referred to authorize a different course, the affiant must attach to it the original of such writing or, possibly, attach to or set forth in it a verified or certified copy of the writing. There is authority elsewhere that the latter course would be sufficient, MacClure v. Noble (1932) 259 Mich. 601, 244 N.W. 174, but we need not decide the question, as in this case neither course was followed.

[3, 4] The affidavit filed by defendant also sets forth certain statements said to have been made by persons other than the affiant or any party to this action. But one of these persons is named, and the statements of the others are lumped together in one general allegation. All this is hearsay and may even be hearsay in the second or some greater degree, for the affidavit does not say that any of these persons made their statements to the affiant. Such testimony would, of course, be incompetent. The affiant avers that these persons have refused to make affidavits, but does not show that he personally knows even this fact. This court suggested in Cowan O. & R. Co. v. Miley P. Corp. (1931) 112 Cal.App.(Supp.) 773, 781, 295 P. 504, that there might be cases where the court, in the exercise of its discretion, should deny a motion for summary judgment even though the defendant was unable to make such a showing as the statute requires. Such a case might exist where the facts of the defense were not within the defendant's knowledge and other persons who knew or claimed to know them refused to make affidavits to be used in opposition to the motion. But to appeal to the court's discretion in such a case, the defendant should at least present an affidavit by some one who states of his own knowledge that such other persons do know or claim to know the facts and have refused to make affidavits, and such affidavit ought to name the other persons and set forth what each one knows or claims to know, in manner similar to an affidavit for continuance on the ground of absence of witnesses. Here there was no such affidavit.

The affidavit for defendant does properly set forth a conversation that the affiant had with plaintiff in which plaintiff made certain admissions, but we see nothing therein which would constitute a defense to this action.

[5] But in spite of this insufficiency of defendant's affidavit, the motion for summary judgment should have been denied for insufficiency of the affidavit of plaintiff. Section 437c, of the Code of Civil Procedure, already referred to, provides that "The affidavit or affidavits in support of the motion must contain facts sufficient to entitle plaintiff to a judgment in the action, and the facts stated therein shall be within the personal knowledge of the affiant, and shall be set forth with particularity, and each affidavit shall show affirmatively that the affiant, if sworn as a witness, can testify competently thereto." Under this provision, summary judgment for plaintiff cannot be ordered, even though affidavits for the defendant be insufficient or absent, unless the plaintiff presents affidavits in support of his motion which comply with the section and show that he is entitled to judgment. See Berick v. Curran (1935) 55 R.I. 193, 198, 179 A. 708; Lonsky v. Bank of U. S. (1927) 220 App.Div. 194, 221 N.Y.S. 177; State Bank v. Mackstein (1924) 123 Misc. 416, 205 N.Y.S. 290; MacClure v. Noble (1932) 259 Mich. 601, 244 N.W. 174.

[6-11] Plaintiff's own affidavit sets forth the provisions of the policies sued on by their legal effect only, without any showing to excuse production of the originals. The provisions of section 437c regarding the form of affidavits for the plaintiff are substantially the same and must have the same effect, so far as the presentation of writings is concerned, as those relating to affidavits for the defendant which we have already considered and construed. Hence the plaintiff's affidavit is insufficient in this respect, if any showing therein of the provisions of the policies is required. However, we think such showing is not necessary in this case. The complaint herein alleges the policies sued on by their legal effect and the answer sets forth their exact language, and denies the execution of policies in any other terms. We see no difference in substance, so far as this case is concerned, between the legal effect of the policies, as set forth in the complaint, and the exact words thereof, as copied in the answer. There is, in reality, no issue in the pleadings as to the issuance of the policies to plaintiff, or their terms. Consequently, the plaintiff was under no necessity of saying anything about these matters in his affidavits supporting his motion for summary judgment. As to the substance of such affidavits, section 437c requires merely that they "must contain facts sufficient to entitle plaintiff to a judgment in the action." This provision must be construed with other provisions of the Code in pari materia, even though it is a later enactment, and with the rule in mind that repeals by implication are not favored. Section 462 of the Code of Civil Procedure provides that, "Every material allegation of the complaint, not controverted by the answer,

must, for the purposes of the action, be taken as true." Nothing in section 437c purports to be an express repeal of this provision, nor do we see any reason for deriving from it a repeal by implication. According to the terms of section 462, a fact admitted in the answer becomes an established fact for the purposes of the action. Welch v. Alcott (1921) 185 Cal. 731, 754, 198 P. 626. At a trial of the action the plaintiff need not prove such a fact and the defendant cannot dispute it, nor can it be overcome even by a contrary finding. Beatty v. Pacific States S. & L. Co. (1935) 4 Cal.App.(2d) 692, 698, 41 P.(2d) 378; see 21 Cal.Jur. 156, 157, for citations of other cases so construing section 462. The affidavits on a motion for summary judgment do not constitute a second set of pleadings in the action. Their purpose is only to show whether the issues apparently made by the formal pleadings are genuine, whether each party has competent evidence to offer which tends to support his side of the issue. On the hearing of such a motion no issues are tried, but the inquiry is limited to the question whether there is an issue to be tried. Cowen O. & R. Co. v. Miley Pet. Corp., (1931) 112 Cal.App.(Supp.) 773, 295 P. 504; Krieger v. Dennie (1932) 123 Cal.App.(Supp.) 777, 10 P.(2d) 820. If the motion is denied for insufficiency of the plaintiff's affidavits, he will not be required, at the trial which must follow, to prove any fact covered by the quoted provision of section 462, because there is no issue regarding it. Why then should he be required to show his ability to prove it, at a hearing intended merely to disclose the reality or unreality of the issues made? Section 462, if applicable here, relieves him from doing so. By its terms it covers such a case, and nothing in the language of section 437c demands that such a case be excluded from the operation of section 462; nor is such exclusion required by the purpose or spirit of said section 437c. If either party finds, on the hearing of such a motion, that his pleading is not adequate, either by way of allegation or denial, the court may and should permit him to amend; but in the absence of some request for amendment there is no occasion to inquire about possible issues not raised by the pleadings.

[12-14] But we find other fatal defects in the affidavits for plaintiff. This is an action on three policies insuring plaintiff against total and presumably permanent disability. The answer denies plaintiff's disability and denies that he made due proof thereof, as required by the policies. In support of his allegations in these respects plaintiff presented two affidavits, one by himself and one by a physician. Regarding his disability, plaintiff averred only that "affiant developed heart trouble and became wholly, totally, and presumably permanently disabled as defined in the aforementioned policies." All of this except the statement as to development of heart trouble is manifestly a mere conclusion. The physician stated that plaintiff had "coronary artery disease, osteoarthritis of the spine, and prostate obstruction" and that his physical condition is such that he "is disabled and unable to engage in any occupation or perform any work for compensation of financial value," but mentioned no act or work which plaintiff either could or could not do. The last-quoted statement is substantially a copy of the language used by the policies in defining a total disability. It is a conclusion or opinion and goes beyond the scope of testimony which could properly be given by a medical expert, both because it is directed to the ultimate fact in issue, People v. Crossan (1927) 87 Cal.App. 5, 16, 261 P. 531; Thomason v. Hethcock (1935) 7 Cal.App.(2d) 634, 637, 46 P.(2d) 832; United States v. Spaulding (1935) 293 U.S. 498, 506, 55 S.Ct. 273, 276, 79 L.Ed. 617; United States v. Hibbard (C.C.A.9th, 1936) 83 F.(2d) 785, 786, and because it includes a conclusion beyond the field of medical science, that is, what work would produce "compensation of financial value." United States v. Sauls (C.C.A.4th, 1933) 65 F.(2d) 886, 887; Rackoff v. United States (C.C.A. 2d) 78 F.(2d) 671, 673. Section 437c requires that affidavits presented on a motion for summary judgment, whether by plaintiff or defendant, set forth the facts "with particularity" and show that such facts are within the personal knowledge of the affiant and that he can competently testify thereto if sworn as a witness. Neither conclusions of law, nor conclusions of fact, nor so-called ultimate facts are sufficient to satisfy the requirements of this section. It requires the presentation in the affidavits of evidentiary facts sufficient to show a cause of action or a defense, as the case may be. Cowan O. & R. Co. v. Miley Pet. Corp. (1931) 112 Cal.App.(Supp.) 773, 780, 295 P. 504.

[15] As to the proof of disability, plaintiff says that he caused his physician to "send in a report of such disability to defendant" and that plaintiff has "on various dates since, submitted to defendant notice and proof of his condition," not stating the contents of any such report, notice or proof. No inference of due proof can be drawn from this statement. The physician states that on June 22, 1935, he gave defendant "notice of said disability hereinbefore set forth, in writing" and that on various dates since he "submitted further written reports" to defendant "concerning his [plaintiff's] disability." No copies of any of these reports or notices are set forth or attached, although they were in writing. The affidavits are therefore insufficient in this respect for the reasons already stated in discussing the failure of defendant's affidavit to show the contents of writings relied on.

[16] Besides its appeal from the judgment defendant has taken an appeal from the order directing the entry of a summary judgment. This order was made before judgment, and as it is not in the list of appealable orders set forth in section 983 of the Code of Civil Procedure (as amended by St. 1935, p. 1963), the appeal therefrom must be dismissed. The order for summary judgment cannot be regarded as in itself a judgment, as appellant contends. It directs what the judgment shall be and amounts to the rendition of judgment, but it is not itself the judgment.

The judgment appealed from is reversed and the municipal court is directed to vacate its order granting plaintiff's motion to strike the answer and cross-complaint and enter judgment for plaintiff, and its order purporting to amend said order. The appeal from the order granting plaintiff's motion to strike the answer and cross-complaint and enter judgment for plaintiff is dismissed. Appellant shall recover its costs of appeal herein.

I concur: SCHAUER, J.

On Petition for Rehearing.

SHAW, Presiding Judge.

Appellant's petition for a rehearing after judgment in the above-entitled cause having been filed, and said petition having been duly considered, it is now ordered that the said petition be, and the same is, hereby denied.

[17-19] Defendant, by petition for rehearing, contends that the portion of the affidavit filed by it which sets forth a conversation with plaintiff shows a defense. The claim is that admissions made by plaintiff in this conversation support affirmative defenses pleaded in the answer to the effect that after the policies in suit had lapsed for nonpayment of premiums plaintiff made material misrepresentations of fact in applications upon which the policies were reinstated. This argument was not very clearly made before submission of the appeal, but assuming that it has been properly presented, we find nothing whatever in the affidavit for defendant in regard to these applications for reinstatement. Defendant cannot rely on the rule stated by us that the affidavits on motion for summary judgment need not cover facts admitted by the pleadings, for these affirmative defenses are, by the terms of section 462 of the Code of Civil Procedure, deemed controverted by plaintiff, without any further pleading. It is true that, since copies of these applications for reinstatement were attached to the answer, their genuineness and due execution are, by virtue of the provisions of section 448 of the Code of Civil Procedure (as amended by St. 1933, p. 2548), deemed admitted unless the plaintiff filed an affidavit denying the same. We are not informed by the record that there was no such affidavit; and the burden being on appellant to show error, we must presume that there was such an affidavit, and that so far as this matter was concerned the lower court properly held that defendant made no sufficient showing of a defense. Moreover, the facts that the policies had lapsed, and that defendant relied on these applications and reinstated the policies on them were necessary parts of these defenses and would not be admitted by a mere admission of the genuineness and due execution of the applications.

Defendant further requests that we pass upon the jurisdictional question raised in argument, and for the purposes of further proceedings in the municipal court we state our opinion thereon. This action was begun in the municipal court, by filing a complaint which stated a case clearly within the jurisdiction of that court. In addition to its answer, in which fraud of the plaintiff in procuring two of the original policies and all of the reinstatements above mentioned was pleaded, defendant filed a cross-complaint against plaintiff, in which the same fraud was pleaded and defendant prayed for can-

cellation of the disability insurance and of insurance of plaintiff's life against death by accident, contained in the policies sued on by plaintiff, and for reformation of the policies by striking those provisions therefrom. Plaintiff's wife was also made a defendant to this cross-complaint, on allegations that she was the beneficiary of the insurance on his life. Defendant contends that this cross-complaint was beyond the jurisdiction of the municipal court and, apparently, that by its filing that court was ousted of jurisdiction of the action. The jurisdiction of that court over the case stated by plaintiff's complaint is not and cannot be questioned.

[20] In so far as the cross-complaint is directed at the plaintiff, it is within the jurisdiction of the municipal court, for it states in effect merely equitable defensive matter, tending to show that plaintiff is not entitled to recover anything on the policies by reason of his fraud. Code of Civil Procedure, § 89, subd. 3, as added in 1933 (St.1933, p. 1811). The prayer of the cross-complaint for cancellation of these portions of the policies does not change this situation. Jacobson v. Superior Court (1936) 5 Cal.(2d) 170, 173, 53 P.(2d) 756. The case of Brix v. People's Mut. Life Ins. Co. (1935) 2 Cal.(2d) 446, 449, 41 P.(2d) 537, is distinguishable from the case at bar because there the action was begun in the superior court on a complaint stating a case within the jurisdiction of the municipal court only, and thereafter the defendant filed in the same court a cross-complaint similar to that now before us, which was within the sole jurisdiction of the superior court, and it was held that the filing of this cross-complaint gave the superior court jurisdiction of the case. The case of Coggins v. Superior Court (1932) 127 Cal.App. 412, 16 P.(2d) 148, is like the Brix Case. Moreover, as pointed out in Jacobson v. Superior Court, supra, the Brix Case arose before the 1933 amendment to section 89 of the Code of Civil Procedure, which was held in the Jacobson Case to have extended the jurisdiction of the municipal court over equitable issues.

[21] As to plaintiff's wife, the cross-complaint attempts to plead, not defensive matter, but a new equitable action beyond the jurisdiction of the municipal court. Whether she is a necessary party to the cross-complaint we cannot determine from that pleading or any other part of the record, as the full provisions of the policies are not set forth therein, and it does not appear what interest she has as beneficiary, nor whether such interest is vested so as to require her participation in an action for their cancellation. We know of no authority for holding that under such circumstances the mere filing of a cross-complaint naming her as a cross-defendant ousted the municipal court of jurisdiction of plaintiff's cause of action or of the action as appearing up to that time. Although section 396 of the Code of Civil Procedure has not been discussed in argument, it is pertinent to the matter involved. As amended in 1935 (St.1935, p. 1947) it provides that "If an action or proceeding is commenced in or transferred to a court which has jurisdiction of the subject matter thereof as determined by the complaint or petition, and it thereafter appears from the verified pleadings, or at the trial, or hearing, that the determination of the action or proceeding, * * * or of a cross-complaint, will necessarily involve the determination of questions not within the jurisdiction of the court, in which the action or proceeding is pending, the court, whenever such lack of jurisdiction appears, must suspend all further proceedings therein and transfer the action or proceeding * * * to a court having jurisdiction thereof." It does not appear from the pleadings here that the determination of the action or the cross-complaint will involve the determination of questions not within the jurisdiction of the court. If on a trial or other proceeding the full provisions of the policies should be presented to the trial court and it should appear therefrom that the plaintiff's wife is a necessary party to the determination of defendant's cross-complaint against plaintiff, the trial court should proceed as required by section 396, Code of Civil Procedure. See Alpers v. Bliss (1904) 145 Cal. 565, 570, 571, 79 P. 171; Ambassador Petroleum Co. v. Superior Court (1930) 208 Cal. 667, 672, 284 P. 445; In re Estate of Visaxis (1928) 95 Cal.App. 617, 621, 273 P. 165.

I concur: SCHAUER, J.

8 Cal.2d 762

CARDINALE v. CARDINALE.

L. A. 14225.

Supreme Court of California.

May 26, 1937.

1. Divorce ⇐327

A foreign divorce decree is subject to collateral attack on ground that it was procured upon a fraudulent domicile, that laws of state granting decree were not complied with, or that spouse, who was domiciled in foreign state which was not the matrimonial domicile, and who procured the divorce, was wrongdoer, whereas other spouse, a citizen of state of forum, who was neither personally served nor appeared in foreign action, was an innocent party.

2. Divorce ⇐326

A foreign divorce decree, regular on its face, is presumed to be valid, and burden is upon party attacking it to overcome such presumption.

3. Divorce ⇐327

In proceeding by husband to set aside judgment for alleged arrears in monthly payments required under separate maintenance decree, and to terminate allowance to wife, findings of trial court on conflicting affidavits that wife failed to meet burden of showing that foreign divorce obtained by husband was procured upon a fraudulent domicile, or that laws of state granting decree were not complied with, and that no delinquent payments were due wife, were binding on appeal.

4. Husband and wife ⇐299(1)

In wife's suit for separate maintenance, decree for wife would establish wife as innocent party and husband as wrongdoer as of date decree was entered, and constitute a bar to any later action for divorce by husband, predicated upon facts in existence prior to such date.

5. Divorce ⇐329

In proceeding by husband to set aside judgment for arrears in monthly payments for wife's support, and to terminate allowance for separate maintenance, Nevada divorce decree procured by husband after wife had secured decree for separate maintenance would be presumed valid, and burden would be on wife to establish that Nevada decree was obtained on false testimony amounting to a fraud upon Nevada court.

6. Divorce ⇐326

Where husband procured Nevada divorce decree after wife had secured decree for separate maintenance in California, it would not be presumed, in proceeding by husband to set aside judgment for alleged arrears in support money, and to terminate allowance to wife in separate maintenance suit, that cruelty, upon which Nevada judgment was predicated, occurred prior to entry of separate maintenance decree, rather than after, in absence of any showing thereon.

7. Divorce ⇐326

An imperfect or defective complaint which otherwise sufficiently states facts to give court jurisdiction of subject matter of action is a mere error or irregularity not going to jurisdiction, and hence, is not a ground of collateral attack on a foreign divorce decree.

8. Divorce ⇐27(1)

A cause of action for divorce may be grounded upon acts of cruelty committed subsequent to final separation of husband and wife.

9. Divorce ⇐326

In proceeding by husband to set aside judgment in separate maintenance suit for arrears in wife's support money, and to terminate allowance for separate maintenance, Nevada decree of divorce secured by husband was not rendered ineffective so as to preclude termination of allowance for wife's support, on theory that proceedings in separate maintenance action established wife's innocent status, in absence of evidence showing wife's continuing status as an innocent party.

10. Husband and wife ⇐283(4)

Where husband procured Nevada divorce decree after decree for wife in California in separate maintenance suit by wife, allowance for separate maintenance was properly terminated as of date that divorce decree was rendered, in absence of any invalidity in Nevada decree.

In Bank.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Sabina Cardinale against Mario Cardinale for separate maintenance, wherein a decree was rendered for the plaintiff which required the defendant to

pay certain sums per month for the support of the plaintiff and the child of the parties. From a judgment setting aside a judgment against defendant for the alleged amount of arrears in monthly payments, modifying the separate maintenance decree, and terminating the allowance to plaintiff of separate maintenance, the plaintiff appeals.

Affirmed.

Prior opinion, 60 P.(2d) 997.

Edwin L. Johnson and Noon & Noon, all of San Diego, for appellant.

A. T. Procopio, of San Diego, and Hugh K. McKevitt, of San Francisco, for respondent.

SEAWELL, Justice.

Appeal from an order terminating the allowance to plaintiff of separate maintenance.

Plaintiff, Sabina Cardinale, and defendant, Mario Cardinale, were married in San Francisco on January 22, 1910, and lived together as wife and husband until about July 27, 1921, there being one child the issue of said marriage. After the separation of the spouses and on July 29, 1921, the wife commenced an action against the husband in the superior court of San Diego county for separate maintenance. The husband answered and cross-complained for divorce on grounds of desertion and extreme cruelty. The trial court found that the wife had been a resident of San Diego county for more than ninety days prior to commencement of the action and of the state of California for more than a year, but that the husband during the past year had been a resident of Tia Juana, Republic of Mexico; that about July 27, 1921, the husband had, without provocation, compelled the wife to leave his home in Tia Juana and had forced her, against her wishes, to live separate and apart from him in National City, Cal., and that by reason of his acts and conduct, the wife had suffered great physical and mental anguish, and her married life had been rendered unbearable and the husband had thereby deserted her. On these findings the court entered a decree of separate maintenance which provided that the wife was entitled to live apart from the husband and to have custody of the child and ordered the husband to pay $40 a month for the child's support and $40 a month for the wife's support. From this decree the husband took no appeal. He made the required payments for wife and child up to December, 1924, when the child died, and thereafter for a number of years, until some time in 1931, he made payments toward the wife's support only.

In the fall of 1931 the husband proceeded to Nevada and there sued the wife for divorce on grounds of extreme cruelty and separation for more than five consecutive years preceding the filing of the action. Service of summons upon the wife was had by publication and upon her default, and on December 9, 1931, the husband was granted a decree of divorce.

On June 18, 1932, in San Diego county, in the separate maintenance action, the wife, without notice to the husband, procured a judgment against him for $998, the alleged amount of arrears in monthly payments due her under the separate maintenance decree. In October, 1932, the husband moved the court to set aside this judgment for arrears and to modify the decree of separate maintenance and to decree that payments for the child terminated as of her death, and payments for the wife's support terminated as of the date of the Nevada divorce, December 9, 1931. In support of his motion the husband filed affidavits setting up the child's death, the Nevada judgment of divorce, and averring that he had in fact made payments to the wife in sums in excess of the amount due her. Counteraffidavits were filed by the wife tending to show that the husband was in fact $998 in arrears and that the Nevada divorce decree, procured on constructive service, was based upon a simulated domicile and false affidavit for publication and hence was fraudulent, void, and subject to collateral attack. The wife pointed to the fact that the husband went to Nevada from Tia Juana for only a short period and left soon after the granting of the divorce and she averred that, as he knew her whereabouts and had made payments to her at about that time, and also knew where her relatives lived, he could not have been unable to locate her and secure personal service. Answering affidavits were filed on behalf of the husband averring that he was sent to Nevada by his employer to investigate the possibilities of locating a business there and he established a bona fide residence and domicile in that state; that, not knowing where his wife was, he had hired one Selvaggi to inquire at her last address, but Selvaggi was unable to ascertain her whereabouts.

The cause was submitted upon these conflicting affidavits and the court on Decem-

ber 15, 1932, entered findings and judgment in favor of the husband. The court found that the husband had established a bona fide residence and domicile in Nevada and there procured a good and valid judgment of divorce, after full compliance with the laws of that state with respect to service upon the wife of summons by publication, and that the husband had performed fully the provisions of the separate maintenance decree and owed the wife nothing thereunder on June 18, 1932. It was therefore adjudged that the $998 judgment entered against the husband on the last-mentioned date be set aside and that the separate maintenance decree of March 2, 1923, be modified and the provisions thereof terminated and that the requirement that the husband pay $40 a month for the wife's support ceased and became inoperative as of December 9, 1931. From this judgment the wife here appeals. Her main contentions relate to the validity and effect of the Nevada divorce decree.

[1, 2] In this state a foreign divorce decree is subject to collateral attack upon three recognized jurisdictional grounds, i. e., (1) that it was procured upon a fraudulent domicile or residence; (2) that the laws of the state granting the decree were not complied with, and (3) that the spouse, who was domiciled in the foreign state, which was not the matrimonial domicile, and who procured the divorce, was the wrongdoer, whereas the other spouse, a citizen of this state, who was neither personally served nor appeared in the foreign action, was the innocent party. If any one of these jurisdictional defects is established as a matter of fact, the foreign decree will not be recognized as valid in this state. However, the foreign decree, regular on its face, is entitled to a presumption of validity, and the burden is upon the party attacking it. Delanoy v. Delanoy, 216 Cal. 27, 13 P.(2d) 719, 86 A.L.R. 1321.

[3] In the trial court appellant's attack upon the Nevada decree was confined to grounds one and two, supra. These two issues were submitted to the trial court upon conflicting affidavits as above described, and the court by its findings held that the burden of attack was not met by appellant. These findings, having sufficient support, on appeal are conclusive and binding upon this court. The further finding of the trial court to the effect that there were no delinquent payments due the wife likewise has sufficient support and will not be disturbed.

[4-7] Appellant, in her opening brief, urges the third ground of attack upon the foreign divorce decree, contending that the husband was the wrongdoer and she was without fault. No evidence whatsoever was presented in the court below upon this subject and the court made no finding of fact with respect thereto. Appellant's claim is that the proceedings in the separate maintenance action established her innocent status.

The effect of the separate maintenance decree was to establish appellant as the innocent party and the husband as the wrongdoer as of the date the decree was entered, March 2, 1923, and to constitute a bar to any later action for divorce by the husband predicated upon facts in existence prior to said date. Helpling v. Helpling, 50 Cal.App. 676, 195 P. 715. Thus, if it appeared that the Nevada divorce was predicated upon acts of cruelty committed by the wife prior to March 2, 1923, there could be no question that the separate maintenance decree established her innocent status and on that ground the foreign decree should be denied recognition. But the record herein utterly fails to show when the acts of cruelty alleged as ground for the Nevada divorce occurred. The complaint in the Nevada action was introduced in evidence. It merely charged extreme cruelty in most general terms, without any reference to the period during which the acts were committed, alleging that "defendant has been guilty of treating plaintiff with extreme cruelty, and inflicted upon him, great and grievous mental and physical suffering and distress," and that for more than five consecutive years immediately preceding the filing of the complaint, which would be from 1926 to 1931, the spouses lived apart without cohabitation. As the presumption is in favor of the validity of the Nevada decree and the burden was on appellant to establish as a fact that it was obtained on false testimony amounting to a fraud upon the foreign court (Delanoy v. Delanoy, supra), it will not be presumed, in the absence of any showing on the subject, that the alleged cruelty upon which the Nevada judgment was predicated occurred prior to entry of the separate maintenance decree on March 2, 1923, rather than after 1923. No contention is made that the Nevada complaint, because of the general tenor of its allegations, was defective or insufficient to support the divorce decree nor could such a contention be sustained in this collateral

proceeding. An imperfect or defective complaint, which otherwise sufficiently states the facts to give the court jurisdiction of the subject matter of the action, is a mere error or irregularity not going to the jurisdiction, and hence is not a proper ground of collateral attack upon a foreign decree of divorce. 9 Cal.Jur. § 157, p. 819.

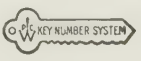
[8, 9] This cause, as above stated, was submitted to the trial court on conflicting affidavits, which made no showing on the subject of whether appellant's innocent status obtained subsequent to entry of the separate maintenance decree in 1923. In view of the presumption in favor of the validity of the later foreign divorce decree, it will not be presumed that she continued to be the innocent spouse after securing separate maintenance. Furthermore, not only was there an absence of any attempt on the part of appellant to prove that she was not at fault after March 2, 1923, but she in fact averred, among other things, as follows: "That the defendant herein is a native of Italy, and prior to 1922 lived for many years in San Francisco with this affiant as husband and wife; that after said defendant commenced the restaurant and saloon business in Tijuana, this affiant lived there with him for a period of two or three weeks, prior to their separation; that since that time he has remained in San Diego a great deal of the time and has continuously visited affiant and remained with her for brief periods, during which they, at affiant's various residences in San Diego, at 555 20th street and on Juniper street, affiant and said defendant had the relationship of husband and wife; that the last occasion was in June of 1931. * * *"

These averments of appellant herself show that subsequent to March 2, 1923, there could have been a condonation of the husband's prior offenses, or a repentance on his part and offer in good faith to fulfill the marriage contract (1 Cal.Jur. pp. 1027, 1028, secs. 79, 80) and the commission thereafter of acts of cruelty by the wife against him upon which the divorce action might have been predicated. A cause of action for divorce may be grounded upon acts of cruelty committed subsequent to final separation of a husband and wife. Stitt v. Stitt (Cal.Sup.) 65 P.(2d) 1297. On the showing made by this record and in view of appellant's failure to offer any proof of her continuing status as innocent party, it must be held that she failed to sustain upon that ground the burden of attack upon the foreign divorce decree.

[10] The trial court, having found no invalidity in the Nevada divorce decree, properly terminated the allowance to appellant of separate maintenance as of the date that decree was rendered. 1 Cal.Jur. p. 1038, § 88; 30 C.J. 1095.

The order and judgment modifying the decree of separate maintenance and setting aside the default judgment is affirmed.

We concur: CURTIS, J.; LANGDON, J.; THOMPSON, J.; SHENK, J.



8 Cal.2d 752

PEOPLE v. LUMBLEY.

Cr. 4090.

Supreme Court of California.

May 25, 1937.

1. Criminal law ⇐997

An appeal by the people from an order granting accused writ of error coram nobis, by which procedure three prior felony convictions admitted by accused were annulled and stricken from judgment and accused was permitted to enter plea that he had not suffered such convictions and judgment and commitment were changed to conform with court's order, was not dismissible on ground that announcement of appeal in open court was not made at time writ was granted but was made at later date (Pen.Code, §§ 1238, subd. 5, 1240).

2. Criminal law ⇐997

Accused who admitted prior convictions of felony in another state voluntarily and with opportunity of advice of counsel, despite fact that he knew he had been granted a pardon, was not entitled to writ of error coram nobis to have prior felony convictions stricken from judgment of conviction on ground that he had been pardoned for prior felonies, where accused was not misled by any officer of court or of law, his pleas were not secured by extrinsic fraud or extorted through fear, and there was no claim that he was insane.

3. Criminal law ⇐997

Petition for writ of error coram nobis made six years and eight months after con-

viction was subject to denial on ground that it was untimely delayed.

4. Criminal law ⇐997

The people were not limited to a writ of certiorari or writ of review as method of attacking orders modifying original judgment of conviction, which orders were made on petition for writ of error coram nobis on claim that orders were part of original proceeding, but could appeal from such orders.

5. Criminal law ⇐997

Any remedy open to prisoner at expiration of his term of service cannot be considered until his term of service has expired (Pen.Code, § 1168).

In Bank.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

John Lumbley was charged with felony of uttering a forged check and with three prior convictions of a felony, and he pleaded guilty to the offense charged and also admitted the prior convictions, and after judgment had been pronounced, defendant filed an application for writ of error coram nobis for modification of the judgment. From an order granting the writ of error coram nobis and from an order modifying the original judgment, the people of the state of California appeal.

Writ of error coram nobis and order modifying judgment set aside, and original judgment restored.

Prior opinion, 63 P.(2d) 851.

U. S. Webb, Atty. Gen., and John O. Palstine, Deputy Atty. Gen., for the People.

Milburn G. Harvey, of Santa Ana, and Jack J. Rimel, of Los Angeles, for respondent.

SEAWELL, Justice.

This proceeding is in form a motion to dismiss an appeal taken by the people from an order granting to the respondent a writ of error coram nobis, by which procedure three prior felony convictions entered by defendant upon his former answers that he had suffered the same on February 21, 1930, some six years and eight months prior to the institution of the instant proceeding, were annulled and stricken from the judgment and the defendant was permitted to enter the plea that he had not suffered the same and the judgment and commitment were accordingly changed to conform with the court's order. Said previous admissions of prior convictions were made and given immediately after the defendant had entered his plea of guilty of the offense charged in the information, together with said prior convictions, as provided by section 1025, Penal Code. The information charged him with the crime of forgery, committed in the county of Orange on January 28, 1930, and with said three previous convictions of forgeries suffered in three separate counties in the state of Arizona, for which he served terms in the state prison of said state. Each prior conviction was had in the superior courts of Arizona and the judgments thereon, in their order, were pronounced on August 28, 1912, December 6, 1913, and July 3, 1922, respectively. When the defendant was brought into court on February 21, 1930, for arraignment, the court appointed an attorney to defend him. After consultation with his attorney for a period of about twenty minutes, he waived time and entered a plea of guilty of the offense charged in the information and admitted the prior convictions of the felony charges alleged against him. He again waived time and the court thereupon recited his plea of guilty of the offense charged in the information and his answers admitting the three prior convictions of said felonies, and thereupon adjudged that he be confined in the state prison at Folsom as provided by law. In obedience of said judgment, he was delivered to the warden of said prison, where he was held in execution of said judgment until he was returned to the superior court of the county of Orange on or about October 23, 1936, upon the order of said court, whereupon the judgment made and entered as aforesaid was invalidated and annulled so far as it adjudged the defendant to have suffered said prior convictions, but that portion which adjudged him guilty of the offense charged in the information was held to be a valid portion of said judgment. The annulment of said portions of the judgment is attempted to be justified on the theory that plenary and almost omnipotent power is vested in courts by virtue of the ancient writ of coram nobis, a writ which has become practically obsolete by the extended powers of the writ of habeas corpus and the adoption of our modern procedure generally, except in the most rare of instances, but notwithstanding its rare applicability to modern procedure, the argument as to its office is often carried to the point where it is assumed that it authorizes courts to override ad libitum substantive and statutory

law, and even, as contended on this motion, it authorizes courts to grant a new trial and invalidate or modify a judgment regularly made and entered upon motion made after six years have intervened between the effective date of the judgment and notice of motion, in cases in which no right of the defendant was denied and no claim was or is made that fraud, intrinsic or extrinsic, or duress or collusion or bad faith upon the part of the prosecution, or any question of defendant's sanity, in any way entered into the proceedings or affected the judgment, or any improper methods were used to induce defendant to enter his several pleas to the information. The writ of error coram nobis in the instant case, so far as its true office is concerned, is but a name under which the proceeding is instituted. The defendant claims that the proceeding really, in effect, is a motion for a new trial and takes up where the judgment pronounced several years ago concluded. The new trial theory, it is claimed, has been restored to life by virtue of the granting of the writ.

[1] It is the theory of respondent that the appeal taken by the people is noneffective, inasmuch as it was not taken as provided by section 1240, Penal Code, which provides that "An appeal may be taken by the people by announcing in open court at the time the order is made that the people appeal from the same." It is claimed by respondent that no announcement was made by the people in open court on October 15, 1936, at the time respondent insists that the writ of coram nobis was granted. It is admitted that the people did make an announcement in open court, in conformity with the requirements of section 1240, Penal Code, on October 23, 1936, at the time it took the matter up for final disposition and, after hearing evidence, made its formal order modifying and changing the judgment. It is respondent's contention that the people, having failed to make said announcement at the conclusion of the proceedings had on October 15, which, it is claimed, was the final order in the proceeding, the announcement made on October 23 came too late and the above Code provision was not complied with. It is conceded that if said announcement had been made on October 15, it would have been timely. We are decidedly of the view that this contention is not supported by the record. A reference to the record shows that on October 2, 1936, respondent filed with the county clerk of said county a petition for a writ of coram nobis, in which he set out a record of his several convictions as heretofore related. The only ground relied upon by respondent in support of the trial court's order invalidating a part of the original judgment consisted of a pardon issued by Hon. G. W. P. Hunt, Governor of the state of Arizona, dated September 28, 1928, wherein he granted to petitioner an unconditional pardon for all the felonies committed by him in the state of Arizona and restored him to all his civil rights. Petitioner was not pardoned because he was wrongfully or improperly convicted, but for the sole reason, as set forth in the proclamation of pardon, that " he has been law abiding and has well supported his dependents." The pardon was granted upon the recommendation of the board of pardons and paroles five years after his discharge from prison.

With the above as the sole ground for the issuance of the writ, the petition came before the court on October 15, for hearing. Several affidavits germane to the pardon were on file. The reporter's transcript of the proceedings certified by the court shows that the proceedings had on October 15 consisted entirely of discussions and arguments between court and counsel as to whether the court had jurisdiction in the premises to grant the relief sought by the writ. The last few minutes of the proceedings are conclusive that no order was made on that day which could be regarded as final and determinative of the court's action. The court said: "I rather think the writ will lie. Perhaps it is somewhat discretional, but on your affidavits, I think the affidavits are sufficient. I think I will let you take your writ. * * * I think he [defendant] will have to come back here for the purpose. * * *

"Mr. Menton: The judgment will have to be corrected then.

"The Court: He [defendant] will have to come back here and the judgment as to the prior convictions will have to be set aside, and he will have to be allowed to enter new pleas. When he gets back I will permit him to withdraw his admissions of the prior convictions but not to withdraw his plea he made here to the crime of forgery.

"The Court (to Mr. Rimel): Well, you may have your writ."

Court adjourned without anything more definite being done than above stated. Final action was deferred to a future day.

It appears that on the following day, October 16, the court filed with the clerk of said court a paper entitled a "writ of error

coram nobis," wherein it recited the fact of said pardons and held that the prior convictions of felonies were based on material error of fact not chargeable to the willful or negligent acts or omissions of the defendant and consisted of the assumption that said prior convictions were valid and subsisting for all legal purposes, whereas said prior convictions had been fully and unconditionally pardoned, and unless said judgments and commitments in so far as they relate to said prior convictions are vacated and set aside they will deprive the defendant of his just rights and liberties. It is also set forth that there is no statutory remedy provided by law for the correction of said material error of fact. It was therefore ordered that said writ issue to correct the judgment in so far as it adjudged the defendant guilty of said prior convictions and all orders, decrees, and commitments theretofore made finding that defendant had suffered said prior convictions be ordered vacated; the privilege of withdrawing the former answers or pleas and to enter new answers to the information charging said prior convictions, and to make any defense thereto, as he may be advised, was granted. Said order further directed the warden to produce the defendant forthwith. The above-mentioned order does not purport to have been made in open court. It was filed with the clerk on October 19, three days after the proceedings had on October 16. The defendant was produced in open court on October 23 for further proceedings, at which time the court assumed jurisdiction to complete the proceeding commenced on October 15. The defendant was on said day brought into court, arraigned as to the prior convictions, and the history of the proceedings had in February, 1930, was recited by the court and the petitioner was informed by the court that he might withdraw his former answers to the information admitting said prior convictions and enter new pleas. He admitted the former convictions, but answered that said pardon expunged them from the record as a matter of law and he thereupon answered that he had not suffered, in the eyes of the law, said convictions. The original pardon was introduced in evidence and the defendant was called to the stand in his own behalf. He was convicted under the name of John Lumbley, but stated that his true name was Melvin Lumbley. He further testified that he was convicted in Arizona under the name of John Lumbley on one of the charges, and under the name of Melvin Lumbley on the other felony charges. At the conclusion of the proceedings the court made an order that the judgment entered in February, 1930, be amended by striking therefrom the finding that the defendant had suffered said prior convictions and found that the defendant was guilty solely of the offense charged in the information and had not suffered said prior convictions. The commitment was ordered to issue in accordance with the amended judgment. The district attorney thereupon gave notice in open court of appeal from the order modifying the original judgment, and in fact annulling material portions of said judgment and commitment. If the proceedings could be held to be as respondent contends they were, to wit, a continuation of the original proceedings of 1930, and the court had jurisdiction to annul a portion of the judgment or grant a new trial, the order made on October 23, 1936, would have constituted an order made after judgment, affecting the substantial rights of the people, section 1238, subd. 5, Pen.Code, and the appeal would have been timely. We understand from respondent's argument that the appeal in form was properly taken, but it was ineffective because not taken on October 15 or 16 for the reasons advanced by respondent. The record does not sustain the contention that the appeal was not timely made in open court from an order which, according to respondent's contention, was not a distinct or separate proceeding but a continuation of the original proceeding. If made after final judgment in 1930, it affected the substantial rights of the people. The appeal from the judgment having also been submitted on its merits, the motion to dismiss the appeal must, therefore, be denied.

[2] We are unable to find in the record any element of fact or law that would justify the granting of said writ. This case presents the main question that was before this court in People v. Superior Court, 4 Cal. (2d) 136, 47 P.(2d) 724. In the instant case there is not even involved the issue of insanity of the defendant at time of trial, which was one of the major grounds at common law which justified the issuance of the writ. Here, respondent offers not a single reason or ground which would entitle him to an order modifying or annulling any portion of the original judgment. He voluntarily and with the opportunity of the advice of his counsel answered that he had suffered said three prior convictions. He knew as a fact that he had suffered them, and he further knew as a matter of

fact that a pardon had been granted. He was not misled in any manner by any officer of the court or of the law. No claim is made that his pleas were procured by extrinsic fraud or extorted through fear or that he was induced by any of the methods which this court has deemed sufficient grounds for the issuance of the writ. The grounds and rare situations which will authorize the granting of the writ have several times been set forth in the decisions of this court.

In People v. Superior Court, 4 Cal.(2d) 136, 47 P.(2d) 724, 730, one of our latest decisions in which the office of the writ was discussed, we said:

"In People v. Reid, 195 Cal. 249, 232 P. 457, 460, 36 A.L.R. 1435, the origin and office of the writ is treated at great length and the conclusions of this court are summed up by the following quotation from Sanders v. State, 85 Ind. 318, 44 Am.Rep. 29, with approval:

" 'It is our opinion that the courts have the power to issue writs in the nature of the writ coram nobis, but that the writ cannot be so comprehensive as at common law, for remedies are given by our statute which did not exist at common law—the motion for a new trial and the right of appeal—and these very materially abridge the office and functions of the old writ. These afford an accused ample opportunity to present for review questions of fact, arising upon or prior to the trial, as well as questions of law; while at common law the writ of error allowed him to present to the appellate court only questions of law. Under our system all matters of fact reviewable by appeal, or upon motion, must be presented by motion for new trial, and cannot be made the grounds of an application for the writ coram nobis. Within this rule must fall the defense of insanity as well as all other defenses existing at the time of the commission of the crime. Within this rule, too, must fall all cases of accident and surprise, of verdicts against evidence, of newly discovered evidence, and all like matters.' "

The case of People v. Moore, 9 Cal.App. (2d) 251, 49 P.(2d) 615, 617, is directly in point. There the defendant had been charged with four prior convictions committed in other states. Three of said convictions were not felonies in this state. He was convicted of the main charge and admitted the prior convictions and was sentenced as an habitual criminal. He appealed and the judgment was affirmed, and he petitioned for the writ of coram nobis. The court, in conceding that three of said prior convictions were not felonies, nevertheless held that the mistake made by defendant could not be cured by a petition for the writ of error coram nobis, which is, in effect, an attack upon the judgment, asking that it be set aside as void on the ground that he was ignorant of the legal effect of said prior convictions under the law of this state at the time he admitted them, and he asked that he be allowed to enter a plea of not guilty. In denying the petition the court said, as may be said with equal force in the instant case:

"We fail to see how the position of defendant in this proceeding is any different from that of a person who pleads guilty to a crime believing in fact that he was guilty of the same at the time of his plea, when, as a matter of law, the facts could not establish his guilt. In the latter situation a defendant would have the undoubted right to make a motion to change his plea. Pen. Code, § 1018; People v. Bacciocco, 81 Cal. App. 19, 251 P. 817; People v. Manriquez, 188 Cal. 602, 206 P. 63, 20 A.L.R. 1441; People v. Cosgrove, 48 Cal.App. 710, 192 P. 165; People v. Moriarity, 61 Cal.App. 223, 214 P. 485; People v. Murphy, 62 Cal.App. 709, 217 P. 810; People v. Junod, 85 Cal. App. 194, 259 P. 101; People v. Blumen, 87 Cal.App. 236, 261 P. 1103. If, however, the defendant omits to do so, and the time has expired for the exercise of any of the statutory remedies after judgment, which might be invoked to cure the situation, and the judgment becomes final, there would be no further legal recourse by any form of judicial review. The same, we believe, is true in this case."

The effect of the pardon, which respondent has argued at considerable length, is not pertinent or necessary to a decision of the issue here presented, and anything that might be said on the question as to whether it had the effect of exempting the defendant from increased punishment on a subsequent conviction would be dicta. Authorities may be cited both for and against the proposition that a pardon for a prior offense does not exempt the person so convicted from the increased punishment on a subsequent offense. That question will be met when squarely presented.

[3] The untimely delay on the part of defendant in petitioning for the writ would have been sufficient grounds for denying it. In People v. Vernon, 9 Cal.App.(2d) 138, 49

P.(2d) 326, it is said that a motion to vacate a judgment must be made within a reasonable time. In that case the delay was shorter than in the present case, and the court held, under the circumstances of that case, delay had been so long as to justify a denial of the writ.

[4] Considerable space is devoted in the briefs to the question as to whether the writ of certiorari was the exclusive procedure available to the people in its attempt to set aside the orders modifying the original judgment. We are of the view that the people were not limited exclusively to the remedy provided by the writ of review. The orders in this case were made on the claim that they were a part of the original proceeding and it was on that theory that a new trial was in effect granted and new pleas entered, and a new judgment and commitment made and signed. It was from these orders, made and entered aforesaid, that the appeal was announced and taken. The coram nobis judgment or order as made and entered annulling a portion of the original judgment is not supported by the record and is therefore noneffective. We may with propriety repeat what we said in People v. Superior Court, supra: "If, in the circumstances of the instant case, the judgment may be nullified [in a material respect] on the showing disclosed by the record of the proceedings herein, the stability of judgments generally in criminal cases will be reduced to a dangerous state of uncertainty."

[5] It may be pertinent to state that under the "good credits" table adopted by the Legislature (section 1168, Pen.Code) the defendant, provided he earned the credits therein provided, would not be entitled to his discharge under the judgment, which was not changed in any respect, until he has served a term of eight years and ten months. The indeterminate sentence under section 1168, Penal Code, is in legal effect a sentence for the maximum term, which in the instant case would be fourteen years unless regularly fixed at a lesser term by the board of prison terms and paroles. No valid or effective order fixing his term at less than a life term appears of record. Any remedy that may be open to the defendant at the expiration of his term of service under the portion of the judgment as to the offense charged, which is admittedly valid, cannot be considered, if at all, until such time shall have arrived.

On the merits of the case presented by the appeal we are satisfied that the writ was erroneously granted and must be set aside. It is therefore ordered that the order vacating and setting aside the three prior convictions of felonies plead against defendant to which he answered that he had suffered said convictions, together with the judgment and commitment as amended, be and they are each set aside and the original judgment entered in said cause is restored to its former and original status as the judgment herein.

We concur: SHENK, J.; CURTIS, J.; THOMPSON, J.



8 Cal.2d 704

H. & J. MABURY CO. v. BRYANT et al.

L. A. 16173.

Supreme Court of California.

May 17, 1937.

1. Appeal and error ⇐640

A motion to dismiss appeal from judgment would be denied, where appeal was timely noticed, and a duly certified clerk's transcript of the judgment roll was filed, though improperly included matters appeared in the transcript.

2. Appeal and error ⇐797(1)

The contention that an appeal is unsubstantial and taken for purposes of delay may be called to Supreme Court's attention under court rule by way of motion duly noticed at any time after filing of appellant's opening brief (Supreme Court Rules, rule 5, § 3).

3. Appeal and error ⇐113(1)

A motion to dismiss appeal from order refusing to vacate judgment will be granted, since all orders to vacate are not appealable.

4. Appeal and error ⇐635(1)

An appeal from order must be dismissed for absence of supporting record, where the only transcript before Supreme Court is that of the clerk of the court below, though transcript contains, in addition to transcript of judgment roll, copies of affidavits and

other matter pertinent to motion to vacate, since matters extraneous to judgment roll form no part of clerk's transcript and must be disregarded.

5. Appeal and error ⇐634

Where certificate of clerk of court below, filed in support of motion to dismiss, declares that no proceeding is pending for bill of exceptions or transcript under statute, appeal must be dismissed or order or judgment affirmed, for absence of a proper record (Code Civ.Proc. § 953a, as amended by St.1935, p. 1960).

In Bank.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action to quiet title by the H. & J. Mabury Company against Calhoun Bryant, an administrator of the estate of Berryman Bryant, deceased, and others. From a judgment for the plaintiff and from an order to vacate the judgment, the defendants appeal, and the plaintiff moves to dismiss both appeals.

Motion to dismiss appeal from judgment denied, and motion to dismiss appeal from order granted, and order dismissed.

Lelia R. Leep and William Shutz, both of San Francisco, and Borton, Petrini & Conron, of Bakersfield, for appellants.

W. B. Beaizley, of Bakersfield, Leib & Leib, and McCutchen, Olney, Mannon & Greene, of San Francisco, for respondent.

PER CURIAM.

Judgment was entered for the plaintiff in this action to quiet title. The defendants noticed an appeal therefrom and from an order denying a motion to vacate the judgment made under section 473 of the Code of Civil Procedure (as amended by St. 1933, p. 1851). Plaintiff has moved to dismiss both appeals.

[1, 2] The motion must be denied in so far as it is directed to the appeal from the judgment. That appeal was timely noticed and there has been filed herein a duly certified clerk's transcript of the judgment roll. The fact that other improperly included matters appear therein does not destroy it as a clerk's transcript of the judgment roll. The presence of this transcript requires a denial of the motion to dismiss the appeal from the judgment. If, as respondent urges, the appeal is unsubstantial and taken for purposes of delay, this may be called to the attention of the court under section 3 of rule V (Supreme Court Rules) by way of motion, duly noticed, "at any time after the filing of the opening brief of * * * appellant," the time for filing which, our records disclose, will not expire until May 20, 1937.

[3, 4] A different result attaches to the appeal from the order refusing to vacate the judgment. The motion to dismiss that appeal must be granted. We shall not undertake to determine whether the particular order here involved comes within the class of orders refusing to vacate that have been held to be appealable or falls within the class that have been held to be non-appealable. In other words, all orders refusing to vacate are not appealable. However, if we assume for present purposes alone, that the order here involved is an appealable order, the appeal therefrom must nevertheless be dismissed in the absence of a supporting record. The only transcript before us is that of the clerk of the court below. While it is true that it contains in addition to a transcript of the judgment roll, copies of affidavits and other matters pertinent to the motion to vacate, these matters extraneous to the judgment roll form no part of the clerk's transcript and must be disregarded.

In Sutcliffe v. Sutcliffe, 220 Cal. 398, 401, 31 P.(2d) 195, 196, the following appears: "No record of the proceedings had upon the motion to vacate the decree has been presented, other than the notice of motion, the large number of affidavits, and the minute order denying the motion, all of which were found in the clerk's transcript. There is neither bill of exceptions nor certificate of attestation by the trial court as to what papers, evidence, or affidavits were before the court or were used on the hearing of the motion. The situation therefore comes squarely within the application of rule XXIX of the Supreme Court. * * * It is a settled rule that, if any matters, other than such as appear upon the face of the judgment roll are sought to be reviewed upon appeal, the record thereof must be presented by a bill of exceptions or by a reporter's transcript." See, also, Jeffords v. Young, 197 Cal. 224, 226, 239 P. 1054.

[5] The certificate of the clerk of the court below, filed in support of the motion to dismiss, declares that no proceeding is pending for a bill of exceptions or transcript under section 953a of the Code of

Civil Procedure (as amended by St.1935, p. 1960). In the absence of a proper record, an appeal must be dismissed or the order or judgment affirmed.

The motion to dismiss the appeal from the judgment is denied and the motion to dismiss the appeal from the order refusing to vacate the judgment is granted and the appeal from said order dismissed.



8 Cal.2d 715

NATIONAL AUTOMOBILE INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

L. A. 16147.

Supreme Court of California.

May 19, 1937.

1. Workmen's compensation ⇐609

In order that injury be compensable under the Workmen's Compensation Act, there must be some causal connection between injury and employment so that the injury may be found to have resulted from some risk of the employment.

2. Workmen's compensation ⇐617

In determination of liability under the Compensation Act, the employee is deemed in the course of his employment when he does those reasonable acts which his contract with his employer either expressly or impliedly permits him to do.

3. Workmen's compensation ⇐787

The injuries sustained by a flower buyer who violated employer's instructions to wait at store in morning until employer arrived, and who was attacked by robbers and beaten when he went out in search of employer, were not compensable because not received in "scope of his employment," since he was violating instructions and was not performing any duty for his employer.

[Ed. Note.—For other definitions of "Scope of Employment," see Words & Phrases.]

In Bank.

Proceeding under the Workmen's Compensation Act by the National Automobile Insurance Company, insurance carrier, to set aside an award of the Industrial Accident Commission of the State of California in favor of T. Ashida.

Award annulled.

C. W. Bowers and Letus N. Crowell, both of Los Angeles, for petitioner.

Everett A. Corten and Emmet J. Seawell, both of San Francisco, for respondents.

CURTIS, Justice.

This proceeding was instituted for the purpose of setting aside an award of the Industrial Accident Commission in favor of one T. Ashida and against the petitioner herein, the National Automobile Insurance Company, the insurance carrier to the employer of T. Ashida. The employer of T. Ashida was S. Murata, doing business under the name of S. Murata & Co. Murata's business was that of wholesale florist, which was carried on at 767-769 South Wall street in the city of Los Angeles. On the day of Ashida's injury, he was to report to his employer's place of business at 3 a. m. His business was to purchase flowers for his employer. He had been told by his employer on the previous day not to purchase any flowers on this particular morning until he met his employer, and to wait at the store until Murata arrived. On this morning, Ashida on his way to work was passed by Murata in the latter's car driving southerly and in the same direction in which Ashida was walking. Murata evidently did not see Ashida as he passed him and continued on his way toward the store without speaking to Ashida, or giving any indication that he saw him. When Ashida reached the place of business of his employer, Murata was not there. Ashida attended to some minor duties, and waited about fifteen minutes for Murata to arrive. As the latter did not put in an appearance at the store, Ashida set out in search of him. While pursuing his search, and when he was some two or three blocks from the store of his employer, he was set upon by robbers, who beat him severely, inflicting serious injuries upon him and robbing him of his money. Upon this state of facts, the commission found that the injuries sustained by Ashida "arose out of and in the course of his employment," and made the award of compensation in his favor, which petitioner asks to have set aside by this proceeding.

[1] The facts of this case are strikingly similar to those recited in the cases of Lumbermen's Mutual Casualty Company v. In-

dustrial Accident Comm., 134 Cal.App. 131, 25 P.(2d) 22, where the employee arrived at the place of employment at 7 o'clock a. m., and was told that he could not commence work until certain boxes arrived. While waiting for the boxes, he crossed the road and was struck by a passing automobile. An award was made in his behalf, but it was annulled by this court. In doing so, the court held as follows: "It is well established that there must be some causal connection between the injury and the employment so that the injury may be found to have resulted from some risk of the employment. * * * It must be conceded that Wilson [the injured employee] was required to remain near the grove in which he was to pick while waiting for the boxes. He was not required to go into the street, nor did any of his duties require him to loiter in the highway in which he was injured. Nevertheless, he chose this road as his waiting place, and was injured by an automobile being driven along this street. We have concluded that the injury must be attributed to a 'risk of the street' and not to a risk of employment."

A similar ruling may be found in the case of San Francisco & Sacramento Railway Company v. Industrial Accident Comm., 201 Cal. 597, 258 P. 86. In that case, the railway company owned and operated a ferryboat for the purpose of transporting its electric trains across the San Joaquin river. A train was ferried across the river, but the overhead trolley failed to contact the electric power line on the river bank. This frequently happened, and the captains of the boats operating this ferry line were directed to report this condition to the line repair staff for repair. In the particular instance involved in that case, the captain of the boat instead of reporting the line out of repair attempted to repair it himself. In so doing, he came in contact with a heavily charged electric wire, and was killed. His dependents were awarded compensation, which the District Court of Appeal annulled, and after the case had been transferred to this court, we adopted the opinion of the District Court of Appeal, and annulled the award. In that case it was held (201 Cal. 597, at page 599, 258 P. 86, 87) that: " 'The evidence is without conflict and shows beyond question that the captain was killed while engaged in work entirely beyond the scope of his employment; that it was done without the knowledge or consent of the employer, and was not a case of emergency which called the captain in his employer's interest to go beyond the scope of his employment.' "

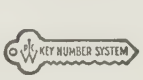
[2, 3] These cases, and especially the latter one, meet all the issues presented in the present proceeding. Ashida, the injured employee, undoubtedly went beyond the scope of his employment. He did so without the knowledge or consent and against the express orders of his employer. There was no emergency which justified him in so acting. Had he remained at his employer's place of business, in all probabilities he would not have sustained any injury, and later, as the evidence shows, he would have soon been joined by his employer, and they could have proceeded upon their day's work together.

Respondent cites and relies upon the case of Hartford Accident & Indemnity Company v. Industrial Accident Comm., 202 Cal. 688, 262 P. 309, 58 A.L.R. 1392. In that action, the injured employee was employed by a newspaper proprietor to deliver newspapers to certain subscribers over a fixed route. The means of transportation and the means of accomplishing the delivery of the paper were left entirely to the employee. The latter made an agreement with a driver of a milk delivery truck, whereby the driver of the milk route would transport the newspaper employee and his papers over the territory covered by his route in consideration of the employee assisting the driver of the milk route in the delivery of milk to his customers. While the employee in accordance with this agreement was delivering milk to a customer, he sustained an injury on account of which he was awarded compensation. This court approved the award, and held that the employee was in the course of his employment when he did those reasonable acts which his contract with his employer either expressly or impliedly permitted him to do. We find no analogy in the facts in that case and those before us in this present proceeding. In the first place, the employee had been expressly instructed by his employer, Murata, to remain at the store until the latter arrived. In leaving the store and going out on to the streets in search of his employer, he was violating the explicit instructions of his employer. In the second place, he was not performing any duty to his employer by leaving the store and looking for the latter. His duties were restricted to the buying of flowers for the business of his employer. As far as the facts show, the employer was attending to certain outside duties, and when they were completed he intended to report to the store where he and Ashida were to go and make purchases of flowers for the day's business.

There was, therefore, not only no causal connection between his employment and the injuries sustained by the employee, but the injury was sustained at a time when the employee was doing that which he had been directed by his employer not to do. It cannot be successfully contended, therefore, that Ashida, the injured employee, has brought himself within the rule approved in the case last cited that an employee is in the course of his employment when he does those reasonable things which his contract of employment expressly or impliedly permits him to do.

For the reason herein stated, it is ordered that the award of the commission be and the same is hereby annulled.

We concur: LANGDON, J.; SHENK, J.; SEAWELL, J.; THOMPSON, J.



VASSERE v. JOERGER. *

Civ. 5672.

District Court of Appeal, Third District, California.

May 25, 1937.

Hearing Granted by Supreme Court July 22, 1937.

1. Limitation of actions ⇐151(2)

The acknowledgment of a debt before limitation has run vitalizes old debt for another statutory period from date of acknowledgment, and action is upon original obligation, while, in case of acknowledgment after limitation has run, action is upon new promise, for which old debt is consideration.

2. Limitation of actions ⇐151(2)

Where debt for services rendered was acknowledged before running of two-year limitation, action brought more than two but less than four years after acknowledgment was barred, as against contention four-year limitation was applicable to action as one on a written promise (Code Civ.Proc. § 339, and § 337, as amended by St.1933, p. 2116).

3. Pleading ⇐329

Where defendant noticed motion to exclude evidence on plaintiff's failure to file bill of particulars within statutory period of five days, court granted plaintiff additional 10 days, and plaintiff failed to file bill of particulars, judgment of dismissal was proper (Code Civ.Proc. § 454).

Appeal from Superior Court, Shasta County; Albert F. Ross, Judge.

Action by Attilio Vassere against Louis P. Joerger. From a judgment of dismissal on demurrer, plaintiff appeals.

Affirmed.

W. H. Morrissey, of Redwood City, for appellant.

Carter, Barrett, Finley & Carlton, of Redding, as amici curiae, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal from a judgment sustaining the demurrer of defendant to an amended complaint without leave to amend and dismissing the action.

In this action, which was commenced February 15, 1935, it is alleged that within four years last past defendant became indebted to plaintiff for services rendered, in the sum of $1,622.13, which indebtedness was acknowledged in a writing set out in the complaint. The complaint then alleged that no part of this amount had been paid, and prayed for judgment.

The acknowledgment set out in the complaint is:

"Feb. 14, 1931.

"This is to certify that I, Louis P. Joerger, owe John Vassere $776.69 for wages due to date with interest included to date and promise to pay same on or before March 1st, 1931. Interest to be charged from this date to March 1st at rate of 7% per annum.

"Louis P. Joerger."

"March 4th, 1932.

"This is to certify that I owe John Vassere $496.44 for additional wages with interest at the rate of 7%.

"Louis P. Joerger."

"August 23rd, 1932.

"This is to certify that I owe John Vassere $349.00 for additional wages with interest at 7%.

"Louis P. Joerger."

The demurrer to this amended complaint was that the purported cause of action was barred under the provisions of section 339 of the Code of Civil Procedure.

*For subsequent opinion see 76 P.2d 656.

[1] Appellant contends the action was based upon a written promise, and the action was not barred until four years after the date of the instrument (Code Civ. Proc. § 337, as amended by St.1933, p. 2116). The first of the written acknowledgments fixed the due date of the amount as March 1, 1931. This case, however, clearly falls within the rule applied in Southern Pac. Co. v. Prosser, 122 Cal. 413, 52 P. 836, 55 P. 145, 147, which distinguishes between the acknowledgment of a debt before the statute has run, and one in which the statute has already run, and holds that the acknowledgment of a debt, before the statute has run, vitalizes the old debt for another statutory period from the date of the acknowledgment and the action is upon the original obligation, while in the case of an acknowledgment made after the statute has run, the action is upon the new promise, for which the old debt is a consideration. As expressed by Chief Justice Beatty, in Southern Pac. Co. v. Prosser, supra: "When a debtor makes a new promise before an action is barred upon the original contract, he does not make himself liable a second time for the same debt, and the old promise is not merged in the new. He merely continues his original liability for a longer term. In other words, he merely waives so much of the period of limitations as has run in his favor. But when his legal obligation is at an end, by reason of the lapse of the full period of limitation, or of a discharge in bankruptcy, a new promise creates a new obligation, and is itself the basis of the action."

[2] This principle was also applied in Maurer v. Bernardo, 118 Cal.App. 290, 5 P.(2d) 36, where several cases are collected and cited supporting the rule. McCormick v. Brown, 36 Cal. 180, 95 Am.Dec. 170, construing section 360 of the Code of Civil Procedure, holds "the acknowledgment or promise made while the contract is a subsisting liability establishes a continuing contract; and when made after the bar of the statute, a new contract." Therefore, since the original obligations were not barred at the time of the acknowledgment in writing, they were renewed or extended for a period of two years only from the dates thereof, and it is obvious that the action was barred.

Complaint is also made of the action of the trial court in entering an order precluding plaintiff from offering evidence on the count set forth in the amended complaint.

[3] The defendant demanded a bill of particulars, the plaintiff failed to comply with this demand within five days as provided by section 454 of the Code of Civil Procedure, and defendant noticed a motion to exclude evidence thereof at the trial. This motion was granted conditionally, the court granting plaintiff an additional ten days in which to file a bill of particulars. No bill was ever filed, and upon that ground it was proper for the court to enter a judgment of dismissal of the action.

Appellant relies upon the case of Henning v. Clark, 46 Cal.App. 551, 189 P. 714, 716, as authority for the proposition that he was not required to furnish a bill of particulars. In that case, however, as the court in its opinion said, "plaintiff here did not sue upon an account, but upon a settlement agreement arrived at after a consultation between the parties."

For the foregoing reasons the judgment must be affirmed, and it is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.



21 Cal.App.2d 116

PEOPLE v. ROTHROCK.

Cr. 2967.

District Court of Appeal, Second District, Division 2, California.

May 20, 1937.

Hearing Denied by Supreme Court June 17, 1937.

1. Homicide ⇐25

Evidence that bullet fired by accused passed through body of victim for whom intended and entered arm of second party sustained conviction of attempted murder of second party on basis of implied finding of specific intent, notwithstanding intent to kill was directed at first party.

2. Criminal law ⇐568

Specific intent as an element of a crime does not require direct proof but may be proved from circumstances surrounding the act from which it may be inferred by the court as a trier of facts.

3. Assault and battery ⇐48
Homicide ⇐17

Where one intends to assault or kill a certain person, and by mistake or inadver-

tence assaults or kills another in his stead, it is nevertheless a crime, and intent is transferred from party who was intended to the other.

4. Criminal law ⇐46

Section of Penal Code relieving accused of responsibility for acts committed without being conscious thereof does not contemplate cases of unsound mind but only cases of sound mind such as those involving somnambulism, or persons suffering with delirium from fever or drugs (Pen.Code, § 26, subd. 5).

5. Criminal law ⇐595(7)

In prosecution for attempted murder and assault with a deadly weapon, refusal to permit a continuance for purpose of securing physician's testimony that accused had a predisposition to mental trouble was justified where plea of not guilty by reason of insanity had not been entered, on ground that general mental condition of accused was not an issue (Pen.Code, §§ 26, subd. 5, 1368).

6. Criminal law ⇐570(3)

A former adjudication of insanity is not decisive of the question of insanity of person at time of commission of crime.

7. Criminal law ⇐331

A defendant to avail himself of defense of insanity must prove by preponderance of evidence that at time of commission of crime charged he was mentally deranged to extent of being incapable of distinguishing between right and wrong in relation to acts charged.

8. Homicide ⇐325

A conviction for attempted murder is not subject to reversal because of former adjudication of insanity, not made in present proceedings, where no plea of not guilty by reason of insanity had been entered.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Donald A. Rothrock was convicted of two charges of attempted murder, and of charge of assault with a deadly weapon, and he appeals.

Affirmed.

Morris Lavine, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for the People.

WOOD, Justice.

Defendant was charged in an information in three counts with the crimes of attempted murder of Golda Draper, attempted murder of John H. Ganzenhuber, and assault with a deadly weapon upon George Zeras. Upon a trial without a jury he was found guilty of all three charges and now appeals from the judgment.

The crimes were committed on September 12, 1935, at a restaurant in Los Angeles at which Golda Draper was employed as a waitress. On two occasions before September 12 defendant had been a customer at the restaurant and the last time he was in the restaurant Miss Draper refused to serve him and asked him to leave because of his misconduct. At that time defendant became abusive and attempted to strike Miss Draper with a cane. On leaving the premises he told Miss Draper that he would "get" her. On the occasion of the commission of the crimes Miss Draper was engaged in her duties when she was shot in the back by defendant. The bullet passed through Miss Draper's body and entered the arm of Ganzenhuber, who at the time was being served by Miss Draper. At that time she did not see defendant. Immediately after the shot was fired George Zeras, the proprietor of the restaurant, followed defendant to the sidewalk, whereupon defendant ordered Zeras to keep away from him and menaced him with a revolver. Zeras sought shelter in the entrance to a barber shop near by, and defendant ran down the street and entered a waiting automobile. Before the shooting the defendant had engaged the services of one Redell, a taxicab driver. After the shooting defendant entered the car and pointed a gun at Redell, directing him to drive down a dark street and stay away from traffic. He told Redell that he had shot a man who had thrown a milk bottle at him. Later that evening defendant was arrested in a hotel and told the arresting officer that his name was Jones. The officer discovered an empty revolver holster upon the person of defendant and asked him where the gun was, to which defendant replied that he did not know. The officer searched the room and found the gun concealed under a mattress. At that time the gun contained six shells, five of which were loaded and one had been discharged. Defendant told the officer that he had shot the girl because she had been mean to him and had taken a bowl of soup away from him.

Defendant contends that the court erred in declining to pass upon his motion for a new trial. This point has already been disposed of upon a former appeal. People v. Rothrock (Cal.Sup.) 63 P.(2d) 807. The unusual proceedings leading up to the point of judgment are set forth in the opinion on that appeal. The Supreme Court entertained an appeal by the prosecution from an order of the trial court vacating the verdict and in reversing the order it was held that, although defendant refused to make a motion for a new trial, the order actually made by the trial court was in effect the granting of a new trial. The cause was remanded to the trial court "with instructions to enter judgment in accordance with the finding of the court."

Before the trial a doubt arose as to the sanity of defendant and upon proceedings conducted under section 1368 of the Penal Code defendant was found to be sane. Upon commencement of the trial of the charges set forth in the information counsel for defendant announced that the defense was to be under subdivision 5 of section 26 of the Penal Code and that the defendant in committing the acts charged did so "without being conscious thereof." Defendant now argues that the court erred in denying him the right to be tried on the ground of "not guilty by reason of insanity." This contention is disposed of by the decision of the Supreme Court above referred to wherein it is pointed out that defendant withdrew his request to enter the plea of not guilty by reason of insanity.

[1-3] Upon the present appeal by defendant from the judgment it is contended that the evidence is insufficient to establish guilt on count two of the information, in which the attempted murder of Ganzenhuber is charged. There is sufficient evidence in the record to sustain the implied finding of the court that the specific intent to murder had been proved. Specific intent as an element of a crime may be proved by showing circumstances surrounding the act from which it may be inferred by the court as a trier of facts. Direct proof is not required, but the circumstances must be such as would justify the court in inferring the intent with which the act was done. People v. Maciel, 71 Cal.App. 213, 234 P. 877. The fact that the intent to kill may have been directed towards Miss Draper did not the less make the crime complete as regards the charge of attempting to murder Ganzenhuber. "Where one intends to assault or kill a certain person, and by mistake or inadvertence assaults or kills another in his stead, it is nevertheless a crime, and the intent is transferred from the party who was intended to the other." People v. Wells, 145 Cal. 138, 140, 78 P. 470, 471.

[4, 5] Complaint is made of the ruling of the trial court refusing to permit a continuance for the purpose of securing testimony from a physician that defendant had "a predisposition to mental trouble." It is provided in section 1016 of the Penal Code that a defendant who does not plead not guilty by reason of insanity shall be conclusively presumed to have been sane at the time of the commission of the offense charged. People v. Methever, 132 Cal. 326, 64 P. 481. In the Methever Case subdivision 5 of section 26 of the Penal Code was given consideration and it was there held that the subdivision in question does not contemplate cases of unsound mind, but that only cases of sound mind are contemplated, such as those involving somnambulists or persons suffering with delirium from fever or drugs. Since the plea of not guilty by reason of insanity had not been entered, the court was justified in its ruling that the general mental condition of defendant was not an issue before the court. The court made no ruling rejecting evidence that the defendant was not conscious of his acts.

[6-8] Defendant also contends that the conviction must be reversed because of a former adjudication of insanity, not made in the present proceedings. There is no merit in this contention. A former adjudication of insanity is not decisive of the question of the insanity of a person at the time of the commission of a crime. To avail himself of the defense of insanity a defendant must prove by a preponderance of the evidence that, at the time of the commission of the crime charged, he was mentally deranged to the extent of being incapable of distinguishing between right and wrong in relation to the acts set forth in the information. Such proof could have been presented under a plea of not guilty by reason of insanity, but no such plea was entered.

The judgment is affirmed.

We concur: CRAIL, P. J.; McCOMB, J.

21 Cal.App.2d 33

COLLONAN v. ROSELLINI et al.

Civ. 10279.

District Court of Appeal, First District, Division 1, California.

May 14, 1937.

As Amended on Denial of Rehearing June 12, 1937.

Hearing Denied by Supreme Court July 12, 1937.

1. Automobiles ⇐245(6, 72)

Contributory negligence of pedestrian, who was struck by automobile on rainy evening near curb while crossing intersection in marked cross-walk and was picked up about twenty feet from point of impact, and negligence of motorist whose view was unobstructed, *held* for jury.

2. Automobiles ⇐160(4)

Motorist, whose automobile struck pedestrian at unobstructed intersection in marked cross-walk, had duty to anticipate that he might meet persons at any point in street and to keep proper look-out for them, to keep automobile under such control as would enable motorist to avoid collision with persons using ordinary care and precaution, and, if situation required, to stop or slow up.

3. Trial ⇐296(4)

In pedestrian's action for injuries sustained when struck by automobile in marked cross-walk at intersection, instruction that public highway is open to reasonable, common, and equal uses of people on foot or in vehicles, and that pedestrian has same right to use highway as automobile owner, *held* not prejudicial, where trial court fully instructed jury concerning relative rights of pedestrians and motorists under statute and ordinances with reference to cross-walks.

4. Damages ⇐130(3)

$5,000 to hospital nurse receiving $120 per month, who sustained skull fracture, brain concussion, cuts on head and arm, and bruises and abrasions on body in automobile accident, *held* not excessive, where injuries affected nurse for more than a year, and she was compelled to give up her position.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Julia Estelle Collonan against L. Rosellini and another, individually and as copartners doing business under the firm name and style of New Castro Market, and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, for appellants.

Henry Heidelberg and John P. Beale, both of San Francisco, for respondent.

TYLER, Presiding Justice.

Action for damages for personal injuries arising out of an automobile accident. Plaintiff alleged that while she was walking southerly across Market street in a pedestrian crosswalk at Diamond street in San Francisco she was struck and injured by an automobile east bound on said street. She alleged that the automobile was owned by the defendants Rosellini and Gialdini, doing business as the New Castro Market, and that it was negligently driven in the course of their business by their employee, defendant Schloffel. Plaintiff's injuries consisted of a fractured skull, concussion of the brain, cuts on her head and arm, and bruises on various parts of her body. General damages were sought in the sum of $50,000 and special damages were prayed for in the sum of $1,245. A joint answer was filed by the three defendants, which consisted of a general denial to which was added the defense of contributory negligence. Trial was had and a motion for a nonsuit was interposed at the conclusion of plaintiff's case, which motion was denied. The jury awarded plaintiff the sum of $5,000 against the three defendants. Motion for a new trial was made and denied. This is an appeal from the judgment. Various grounds are relied upon for a reversal. It is claimed the evidence fails to establish that defendants were negligent; that it establishes plaintiff was guilty of contributory negligence as a matter of law; that the jury was misdirected to the prejudice of defendants; and that the damages are excessive.

There was evidence to show that the accident occurred in the vicinity of the intersection of Market and Diamond streets in San Francisco. At this point Market street is 75 feet wide from curb to curb, with abutting sidewalks 10 feet wide. The center of the street is marked with the usual white line. Generally speaking, Market street in this vicinity runs east and west, and Diamond street north and south. Between 5:30 p. m. and 6 p. m. of Novem-

ber 3, 1934, plaintiff left her residence to do some shopping. It was dark and there was a drizzling rain falling. She walked southerly on the west side of Diamond street until she reached the north side of Market and then crossed Diamond street easterly to the northeast corner of Market and Diamond. While crossing from the north to the south side of Market street, she was struck by the automobile above mentioned, which was east bound, after she had passed the center line of the street. There was a conflict in the testimony as to whether or not plaintiff was walking in the pedestrian lane at the time she was struck.

[1, 2] In support of their contention that the judgment lacks evidentiary support, defendants claim that the automobile was traveling at a lawful rate of speed; that it was being operated on its lawful side of the street; that it was properly equipped and under proper control; that it had the right of way, for which reasons it is claimed inevitable that defendants were without fault. There was testimony to show, however, that when plaintiff stepped from the north curb of Market street to cross that street to the south she walked about 6 feet from the curb and then stopped to allow some automobiles going westerly on Market street to pass her. The road being then clear she walked fast to about the center of Market street and then looked and saw the lights of an eastbound automobile about 145 feet to 150 feet away. She then stopped and looked again when she was just over the white line marking the center of Market street and concluding she was safe, with the automobile so far away, she proceeded on her course when she was struck within a few feet of the curb by the approaching machine. The driver testified that his headlights were lighted and the vision was good, but that he did not see plaintiff until within a foot of her. Although the evidence was conflicting as to whether plaintiff was walking in the pedestrian lane, there is sufficient evidence to show that she was. The lawful rate of speed at the intersection of the streets where the accident occurred is 15 miles an hour. The driver testified he was traveling from 15 to 20. The severe injuries plaintiff suffered and the fact that she was rendered unconscious for over a week by the impact, together with the fact that she was picked up some 20 feet from the pedestrian lane from which she had been knocked or carried were circumstances from which the jury might reasonably infer that the driver was traveling at a rate of speed much in excess of that to which he testified and of which he was the only witness, no other person having witnessed the accident. The jury by its verdict determined that plaintiff had used due diligence in crossing the street and that defendant driver was negligent in not seeing her. The questions of the negligence of the defendant and the contributory negligence of plaintiff were facts for the jury to determine upon all the circumstances of the case. It was the duty of the driver to anticipate that he might meet persons at any point in the street and to keep a proper lookout for them, and to keep his machine under such control as would enable him to avoid a collision with persons using ordinary care and precaution, and if the situation required to stop or slow up. He was familiar with the neighborhood and the location of the pedestrian lane. His vision was unobstructed and he should have seen plaintiff on the marked crosswalk, and his failure to do so under the circumstances constituted negligence on his part. The evidence is amply sufficient to support the verdict.

[3] Nor do we think there is any merit in the claim that the trial court misdirected the jury in its instructions. An instruction was given to the effect that a public highway is open to the reasonable common and equal uses of the people on foot or in vehicles; that the pedestrian has the same right as the owner of an automobile to use the highway. It is contended that while the instruction correctly states the rule as it existed at common law, statute and ordinances have abrogated it, giving to motorists a superior right over pedestrians to the use of the highway in areas outside of pedestrian crosswalks. The court fully instructed the jury concerning the relative rights of pedestrians and motorists under the statute and ordinances with reference to crosswalks, and the jury could not possibly have been misled in the matter. The instructions on this subject as a whole fully and fairly stated the law correctly. Again, it is claimed that the court erred in instructing the jury as to the degree of care exacted from pedestrians and motorists, and also concerning the duty of plaintiff to look when crossing the lane. We do not deem a recital of these instructions to be necessary, for it would answer no useful purpose. Suffice it to say there were no errors in the giving of them.

[4] Nor is there any merit in the further claim that the damages are excessive. Plaintiff at the time she received the injuries was a nurse employed in a clerical capacity at the Veterans' Hospital where she received a salary of $120 a month. Her injuries, as stated, consisted of a fracture of the skull, concussion of the brain, cuts on her head and arm, and bruises and abrasions of her body. These injuries affected her for over a year thereafter and she was compelled to give up her then position. Under these circumstances, the amount recovered cannot be held to be excessive.

From what we have said, it follows that the judgment based on the verdict should be and it is hereby affirmed.

We concur: KNIGHT, J. ; CASHIN, J.



21 Cal.App.2d 18

CROCE v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO.

Civ. 10445.

District Court of Appeal, First District, Division 1, California.

May 13, 1937.

1. Attorney and client ⇐21

Attorney, who represented several clients associated in business enterprise in defense of action involving their common interest, wherein it was denied that copartnership existed between them, was not disqualified, and law firm of which he later became a member was not disqualified from afterwards representing one of the former clients as plaintiff in subsequent litigation instituted against his associates, wherein it was alleged that a copartnership did exist between them.

2. Witnesses ⇐199(2)

When two or more clients employ the same attorney in the same business, communications made by them in relation to such business are not privileged inter sese, and such communications are not privileged as between any one of the parties and the attorney.

Mandamus proceeding by G. C. Croce against the Superior Court of the State of California, in and for the City and County of San Francisco.

Peremptory writ denied, and proceeding dismissed.

Chandler & Quayle, of San Francisco, for petitioner.

Hatfield, Wood, Perry & Maddux, of San Francisco, for respondent.

KNIGHT, Justice.

[1] The determinative question here presented is whether an attorney who has represented several clients associated in a business enterprise, in the defense of an action involving their common interest, wherein it was denied that a copartnership existed between them, is disqualified, and the law firm of which he later became a member is also disqualified, from afterwards representing one of those former clients as plaintiff in subsequent litigation instituted against his associates, wherein it is alleged that a copartnership did exist between them. After a hearing in the superior court pursuant to a motion made by the petitioner in that behalf, wherein evidence was introduced, the superior court held in the negative, and thereafter petitioner instituted this proceeding in mandamus to compel the superior court to enter its order disqualifying said attorney and the firm of which he is now a member from further participation in the latter litigation. We are of the opinion that the trial court's ruling should be sustained.

The ground urged for such disqualification is that while said attorney was representing the common interests of all of said clients in the former litigation, he acquired confidential information from petitioner and his associates which is material, relevant, and pertinent to the determination of the latter litigation, and that such information may be, and petitioner fears it will be, used in the latter litigation to the detriment, damage, and prejudice of petitioner.

[2] But it appears to be well settled, as stated in Thornton on Attorneys at Law (vol. 1, p. 183), that: "When two or more clients employ the same attorney in the same business, communications made by them in relation to such business are not privileged inter sese; nor are such communications privileged as between any one of the parties and the attorney. It is the secrets of the client which affect his right that the law does

not permit the attorney to divulge. By selecting the same attorney, and making their communications in the presence of each other, each party waives his right to place those communications under the shield of professional confidence." See also, In re Wahl's Estate, 218 Ill.App. 295; Stewart v. Todd, 190 Iowa, 283, 173 N.W. 619, 180 N.W. 146, 20 A.L.R. 1272, and Chamberlayne, The Modern Law of Evidence, vol. 5, p. 5281. The same doctrine is adhered to in California. Harris v. Harris, 136 Cal. 379, 69 P. 23; In re Estate of Bauer, 79 Cal. 304, 21 P. 759, 762. As said in the latter case: "When two persons address a lawyer as their common agent, their communications to the lawyer, as far as concerns strangers, will be privileged, but as to themselves they stand on the same footing as to the lawyer, and either can compel him to testify against the other as to their negotiations." Therefore, in the present case the communications made by parties united in a common interest to their joint or common counsel, while privileged against strangers, are not privileged as between such parties nor as between their counsel and any of them, when later they assume adverse positions.

Petitioner points out that in the cases cited the question of disqualification arose when the attorney was called as an adverse witness. But in any situation the foundation of disqualification is the existence of a former confidential relationship, and while no cases precisely in point have been cited by either side, it would seem to follow necessarily that if under the circumstances stated an attorney is not disqualified from serving as an adverse witness, it cannot be held that under the same circumstances he is disqualified from serving as an adverse attorney.

Rule 5 of the Rules of Professional Conduct (213 Cal. cxiv) and rule 37 of the Canons of Ethics of the American Bar Association, cited by petitioner, are not applicable. They are controlling in cases of disclosure to a stranger of confidential information obtained from a client. For like reasons the California cases and Code sections cited by petitioner in support of his position, notably Galbraith v. State Bar, 218 Cal. 329, 23 P.(2d) 291, and Wutchumna Water Co. v. Bailey, 216 Cal. 564, 15 P.(2d) 505, are not in point.

The conclusions reached on the controlling issue above mentioned makes it unnecessary to inquire into the remaining points urged by respondent in opposition to the granting of the petition.

The peremptory writ is denied, and the proceeding is dismissed.

We concur: TYLER, P. J.; CASHIN, J.



21 Cal.App.2d 85

MINTZER v. WILSON et al.

Civ. 10165.

District Court of Appeal, First District, Division 1, California.

May 18, 1937.

1. Trial ⇐168

Motion for directed verdict is in nature of demurrer to evidence and is governed by practically the same rules.

2. Trial ⇐178

All evidence adduced on behalf of party against whom motion for directed verdict is granted, and all fair and reasonable inferences to be deduced therefrom, must be taken as true.

3. Appeal and error ⇐997(3)

Trial court will be held to have erred in granting motion for directed verdict unless it appears as matter of law that no other reasonable conclusion than the one adopted by trial court is legally deducible from evidence, and that any other holding would be so lacking in evidentiary support that appellate court would be impelled to reverse holding upon appeal, or trial court would be impelled to set holding aside.

4. Innkeepers ⇐10

Granting of motion for directed verdict, made by innkeeper sued by guest for injuries sustained when plaster fell on bed in which guest was sleeping, *held* error, since guest was entitled to benefit of res ipsa loquitur doctrine.

5. Negligence ⇐121(2)

Res ipsa loquitur doctrine in itself establishes inference of negligence.

6. Innkeepers ⇐10

Proof of fact that guest has been injured by falling plaster, while occupying ho-

tel room to which she has been assigned, is legally sufficient to establish prima facie case of negligence of innkeeper.

7. Innkeepers ⇐10

Innkeeper, sued by guest for injuries by falling plaster while occupying hotel room to which guest has been assigned, must explain external cause, if accident was due to external cause for which innkeeper was not responsible.

8. Negligence ⇐121(3)

Generally, res ipsa loquitur doctrine applies in cases of personal injuries caused by objects falling from buildings and other structures.

9. Innkeepers ⇐10

Innkeeper is liable for all injuries occurring to his guests from latent defects in premises.

10. Innkeepers ⇐10

Allegations of guest, suing innkeeper for injuries by falling plaster while occupying hotel room to which guest had been assigned, that ceiling was of faulty construction and that its condition had been allowed to become defective and unsafe by innkeeper through his failure properly to operate, manage, control, and maintain hotel building, were general and not specific allegations of negligence, and hence guest was not precluded from invoking res ipsa loquitur doctrine.

11. Negligence ⇐121(2)

Allegations of specific acts of negligence do not deprive plaintiff of benefit of res ipsa loquitur doctrine so far as specific acts are concerned, but merely limit plaintiff's right of recovery to acts pleaded, and relieve defendant from burden of disproving or meeting any other negligent acts than those alleged.

12. Negligence ⇐136(6)

Res ipsa loquitur doctrine is not limited to cases where nature of accident not only supports inference of defendant's negligence, but excludes all others, and even though two or more inferences may reasonably be drawn from facts, leaving doubtful the question whether ultimate cause of injury is defendant's negligence, issue is still one of fact to be determined by jury from all the evidence in the case.

13. Innkeepers ⇐10

Res ipsa loquitur doctrine *held* applicable in guest's action against innkeeper for injuries by falling plaster while occupying hotel room to which guest had been assigned, notwithstanding that external elements, such as earthquake, activities of guests in room above, or passing street cars or automobiles might have caused plaster to fall, in absence of evidence of earthquake.

14. Innkeepers ⇐10

Operation of hotel with ceilings in such condition that they would be likely to fall as result of ordinary vibrations caused by activities of hotel guests, or passing street cars or automobiles, would constitute negligence, as respects innkeeper's liability to guest for injuries by falling plaster while occupying hotel room to which guest had been assigned.

15. Innkeepers ⇐10

Whether inference of negligence, established under res ipsa loquitur doctrine by falling of plaster on guest while occupying room to which guest had been assigned by defendant innkeeper, was overcome by plasterer's testimony as to construction of ceiling, *held* for jury.

16. Negligence ⇐136(6)

Whether defendant has successfully met and rebutted prima facie case made by plaintiff, in action wherein mere proof of happening of accident and circumstances surrounding accident give rise to inference of negligence, is to be determined by jury from all the evidence in the case.

17. Negligence ⇐136(6)

Inference of negligence created by application of res ipsa loquitur doctrine constitutes evidence which cannot be disregarded by jury, but is to be weighed and considered as against evidence adduced by defendant in rebuttal thereof.

18. Trial ⇐41(5)

Disobedience of court's order to remain outside courtroom until called as witness may subject witness to punishment for contempt, but does not constitute ground for exclusion of witness' testimony.

19. Appeal and error ⇐1047(1)

Exclusion of testimony of plaintiff's witness, who was in courtroom when all witnesses had been excluded by order of court, *held* prejudicial error, where witness did not know of court's order and plaintiff's counsel was unacquainted with witness and was unaware of witness' presence, notwithstanding that plaintiff took no exception to ruling excluding testimony and

did not state what was intended to be proved by witness (Code Civ.Proc. § 647).

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Dolly Mintzer against Robert A. Wilson and others. From the judgment, the plaintiff appeals.

Reversed.

Merryl C. Shaver, of San Francisco, for appellant.

O'Connor, Fitzgerald & Moran and Leo R. Friedman, all of San Francisco, for respondents.

KNIGHT, Justice.

The trial court granted defendants' motion for a directed verdict, and from the judgment entered thereon plaintiff appeals.

The action was for damages for personal injuries resulting from an accident which happened in the Von Dorn Hotel in San Francisco. Plaintiff had been a paid guest therein for approximately a month, and was assigned to and occupied a room on the fourth floor. Shortly before 4 o'clock in the morning while she was asleep in the bed in her room, an area of the plastered ceiling weighing thirty or forty pounds and about three or four feet in diameter fell on the bed, striking her on the body and legs, and causing severe and painful injuries, which developed symptoms of phlebitis and required hospitalization and considerable subsequent medical treatment. Besides establishing the facts above narrated, plaintiff introduced testimony showing that for some time prior to the accident the plaster had been falling from the ceiling in other places in the hotel, and that defendants knew thereof and had repaired the same; that some had fallen in the hallway on the fourth floor near the room to which plaintiff had been assigned. Defendants offered no evidence to explain the cause of the accident, the only witnesses produced by them being medical experts whose testimony was confined to the question of the severity of plaintiff's injuries.

[1-3] A motion for a directed verdict is in the nature of a demurrer to the evidence, and is governed by practically the same rules. All evidence adduced on behalf of the party against whom the motion is granted, and all fair and reasonable inferences to be deduced therefrom, must be taken as true (Hunt v. United Bank & Trust Co., 210 Cal. 108, 291 P. 184; Butler-Veitch, Inc., v. Barnard, 77 Cal.App. 709, 247 P. 597); therefore unless it can be said as a matter of law that no other reasonable conclusion than the one adopted by the trial court is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that an appellate court would be impelled to reverse it upon appeal, or the trial court to set it aside, it must be held on appeal that the court erred in taking the case from the jury and itself rendering the decision. Umsted v. Scofield Engineering Construction Co., 203 Cal. 224, 263 P. 799; Mairo v. Yellow Cab Co., 208 Cal. 350, 281 P. 66.

[4-9] It is evident that the trial court erred in taking the present case from the jury, for the reason that the case is obviously one wherein plaintiff was entitled to the benefit of the doctrine of res ipsa loquitur, which in itself established an inference of negligence. Morris v. Zimmerman, 138 App.Div. 114, 122 N.Y.S. 900; Halterman v. Hansard, 4 Ohio App. 268. In each of the cases just cited, as here, the plaintiff was injured by falling plaster while occupying a hotel room to which the plaintiff had been assigned; and as the court there said in applying the doctrine of res ipsa loquitur, plaster does not ordinarily fall from properly constructed ceilings; and therefore proof of the fact that a plaintiff has been injured by falling plaster while occupying a hotel room to which he had been assigned is legally sufficient to establish a prima facie case of negligence. If the accident is due to some external cause for which the innkeeper is not responsible, it is incumbent on him to explain it. So far as our attention has been called, no case identical in its facts has thus far arisen in this state, but it is held generally that the doctrine of res ipsa loquitur applies in cases of personal injuries caused by objects falling from buildings and other structures [Ellis v. Owen Roofing Co., 6 Cal.App.(2d) 25, 43 P.(2d) 558; Cooper v. Quandt, 105 Cal.App. 506, 288 P. 79; Michener v. Hutton, 203 Cal. 604, 265 P. 238, 59 A.L.R. 480; Harvey v. San Diego Electric R. Co., 92 Cal.App. 487, 268 P. 468]; and there would seem to be far more reason for the application of the doctrine in a case such as we have here because of the existence of the relationship between

the parties, which charges the innkeeper with liability for all injuries occurring to his guests from latent defects in the premises. 14 Cal.Jur. 326. The case of Wadleigh v. Bumford, 229 Mass. 122, 118 N.E. 265, cited by defendants, is not in point because it is not an innkeeper case. It involves the relationship of landlord and tenant, in which a different rule of liability is held to apply. 15 Cal.Jur. 704.

[10, 11] Defendants contend that plaintiff pleaded specific acts of negligence and therefore is precluded from invoking the doctrine of res ipsa loquitur. There is no merit in the contention. The complaint alleged merely that the ceiling "was of a faulty construction and its condition had been allowed to become defective and unsafe by the defendants through their failure to properly operate, manage, control and maintain said building in which said hotel was conducted." As will be noted, the foregoing allegations do not attempt to explain or set out in detail wherein the construction of the ceiling was faulty, nor to state specifically the reason why it fell. The allegations are therefore nothing more than general allegations of negligence. Lejeune v. General Petroleum Corp., 128 Cal.App. 404, 18 P.(2d) 429. However, in any event, the well-settled rule is that allegations of specific acts of negligence do not deprive a plaintiff of the benefit of the doctrine of res ipsa loquitur so far as those specific acts of negligence are concerned. They merely limit plaintiff's right of recovery to the acts pleaded and the defendant is relieved from the burden of disproving or meeting any other negligent acts than those alleged [Atkinson v. United Railroads, 71 Cal.App. 82, 234 P. 863; Armstrong v. Wallace, 8 Cal.App.(2d) 429, 47 P.(2d) 740], and in the present case the evidence introduced by plaintiff in support of her case was confined to the elements of negligence pleaded.

Defendants further contend that the doctrine of res ipsa loquitur is not available where the injuries could have been occasioned by two causes, for one of which defendant is responsible, but not for the other; that such doctrine is to be applied only when the nature of the accident itself not only supports the inference of defendants' negligence but excludes all others (citing Olson v. Whitthorne & Swan, 203 Cal. 206, 263 P. 518, 58 A.L.R. 129, and White v. Spreckels, 10 Cal.App. 287, 101 P. 920). And in this connection defendants suggest in their brief that any number of external elements might have caused the plaster to fall, none of which could be attributed to defendants' negligence, for example, an earthquake, or the activities of guests in the room above or plaintiff's own activities, or, as one of plaintiff's witnesses stated, by "jolts from street cars, vibrations of the house."

[12-14] As pointed out, however, in the case of Lejeune v. General Petroleum Corp., supra, wherein the authorities upon the subject are analyzed, including Olson v. Whitthorne & Swan, supra, and White v. Spreckels, supra, the rule which defendants seek to have applied is not the law. As held therein the doctrine of res ipsa loquitur is not limited to cases where the nature of the accident not only supports the inference of defendants' negligence but excludes all others; and even though two or more inferences may reasonably be drawn from the facts, which leaves doubtful the question of whether the ultimate cause of the injury is the defendants' negligence, the issue is still one of fact to be determined by the jury from all the evidence in the case. Furthermore, there was no evidence whatever in the present case of any earthquake; and none of the other causes suggested would exculpate defendants from responsibility, because obviously the operation of a hotel wherein the ceilings of the rooms are in such condition that they are likely to fall as the result of ordinary vibrations caused by the activities of hotel guests, or passing street cars or automobiles, would constitute negligence.

[15-17] Defendants also contend that in any event the inference of negligence established by the doctrine of res ipsa loquitur was overcome in the present case by the testimony of one of plaintiff's witnesses. But this, too, was a question of fact which should have been left to the determination of the jury. As said in Michener v. Hutton, supra, it is for the jury to determine from all the evidence in the case whether the defendant has successfully met and rebutted the prima facie case made out by the plaintiff in an action wherein mere proof of the happening of the accident and the circumstances surrounding it give rise to an inference of negligence; and the inference of negligence created by the application of the doctrine of res ipsa loquitur constitutes evidence which may not be disregarded by the jury, but is to be weighed and considered as against the evidence adduced by the defendant in rebuttal thereof.

The witness in question was a plasterer, hired by defendants subsequent to the accident to repair the hotel ceilings, including the one in the room in which plaintiff was injured; and on cross-examination he admitted having stated to defendants' counsel, long after the repair jobs had been completed and the commencement of the action, that at the time the repairs were made he was not able to detect any faulty construction of the ceiling in this particular room. But on direct examination he testified that the ceilings in the hotel were not lathed; that the ceiling plaster had been applied in uneven thicknesses to the underside of the concrete flooring, and that some of the surfaces to which it was applied were smooth, as if the concrete had been poured on the smooth side of the board frames; that he did not remember whether the surface of the ceiling of the room in question was smooth or rough; that if the plaster became loose on account of the smoothness of the surface to which it had been attached it would of course fall, but that he did not know what caused it to fall in this particular room. It will be seen, therefore, that at the most his testimony went no further than to raise a conflict on the point at issue. Harvey v. San Diego Electric R. Co., supra.

[18, 19] Irrespective of the questions above discussed, the trial court, in our opinion, committed prejudicial error in refusing to allow one of plaintiff's witnesses to testify in the case. In this regard it appears that at the morning session of court an order was made excluding all witnesses from the courtroom except the one on the witness stand. The witness in question was subpœnaed for the afternoon session, and evidently being unaware of the rule excluding witnesses, he entered the courtroom and remained therein until called as a witness. Counsel for plaintiff was unacquainted with the witness, and unaware of his presence in the courtroom. After the witness took the stand and was asked certain preliminary questions relating to the issues of the case, defendants objected to his giving any further testimony upon the ground that he had disobeyed the court's instructions. The objection was sustained, and plaintiff was deprived of the witness's testimony. As held in People v. Boscovitch, 20 Cal. 436, and People v. Mack, 115 Cal. App. 588, 2 P.(2d) 209, disobedience of the court's order to remain outside the courtroom until called as a witness may subject a witness to punishment for contempt, but such disobedience does not constitute ground for the exclusion of his testimony. To the same effect, see 64 Cor.Jur. 121. Defendants contend that plaintiff is not in a position to complain of the matter because she took no exception to the trial court's ruling, and did not state what she intended to prove by said witness. Neither point is well taken. Section 647 of the Code of Civil Procedure provides that "a ruling sustaining or overruling an objection to evidence" is deemed to have been excepted to; and it appears from the preliminary questions propounded to the witness and his answers thereto that his testimony would have been material; moreover, the record discloses that counsel for plaintiff sought to explain in open court, and evidently for the purposes of the record, the materiality of the testimony the witness was about to give, but he was not allowed to do so.

Upon the grounds and for the reasons stated, the judgment is reversed.

We concur: TYLER, P. J.; CASHIN, J.



21 Cal.App.2d 96

In re BUTZOW'S ESTATE.

Civ. 10407.

District Court of Appeal, First District, Division 1, California.

May 19, 1937.

1. Wills ⇐264

Will contest, filed within statutory time, enures to benefit of interested party intervening after such time, and statute of limitations is no defense to his petition in intervention (Probate Code, §§ 380, 381).

2. Wills ⇐264

One instituting or attempting to join in will contest must be interested person, and court may require contestant to establish such fact before proceeding with trial, but it is necessary to allege only that such person is heir at law of decedent (Probate Code, § 380).

3. Wills ⇐264

Allegation of petition to intervene in, and answer to, will contest that petitioner

was testatrix' sole heir, being equivalent to denial of like averment by original contestant, was unnecessary part of statement of petitioner's cause of action and presented no material issue, so that petitioner was not estopped thereby to maintain contest and such allegation, considered as evidentiary fact, must be disregarded in determining sufficiency of pleading.

4. Statutes ⇐207
Wills ⇐423

Section of statute, declaring probate of will, not contested within time specified, conclusive, does not enlarge right, given any interested person, not party to or having actual notice of will contest, by previous section, to contest will at any time within six months after probate thereof, but must be read with latter section, on provisions of which such right depends (Probate Code, §§ 380, 384).

5. Wills ⇐384

Order striking intervener's answer to will contest was not prejudicial to intervener, if erroneous, where answer contained no material matter not in petition or complaint in intervention.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

In the matter of the estate of Blanche Johnson Butzow, deceased, of which A. Donham Owen is executor. From a judgment, entered against Kate G. Burtnette after sustaining demurrers to and dismissing her petition in intervention and striking out her answer to a contest of decedent's will by Elizabeth A. Ennis, petitioner appeals.

Affirmed in part and reversed in part.

John Carfraie Birnie, Walter H. Linforth, and William M. Cannon, all of San Francisco, for appellant.

Charles S. Wheeler and Charles S. Wheeler, Jr., both of San Francisco, for respondents.

PER CURIAM.

Appeal from a final judgment entered against appellant Kate G. Burtnette following an order sustaining demurrers to, and dismissing, her petition in intervention, and an order striking out her answer to a contest filed by Elizabeth A. Ennis, of the alleged will of the decedent above named.

The will was admitted to probate on December 31, 1934, and the Ennis contest was filed March 11, 1935, within the six months' period specified in the statute. Probate Code § 380. Appellant obtained leave of the court and her pleadings were filed on August 8, 1935, over seven months after the probate of the will.

Contestant Ennis alleged herself to be decedent's cousin and sole heir at law; that the purported will was not executed by decedent, and facts which, if true, would establish that the formalities necessary to constitute the same a valid will were not complied with; further, that decedent was not at the time of sound and disposing mind and that the alleged execution of the document was procured by undue influence. Appellant, by her petition or complaint, sought to join in the contest. She also alleged substantially the same grounds of contest as those contained in the Ennis pleading. As grounds for her right to join in the contest, she alleged herself to be decedent's cousin, next of kin and sole heir at law. Substantially the same allegations were contained in her answer to the Ennis pleading. The executor of the purported will and one Alice Seckels, named as a legatee and devisee therein, moved to strike appellant's answer on the ground that the same was sham and irrelevant; they also filed seperate demurrers to her petition in intervention on general grounds, and pleaded further that the several grounds of contest therein were barred by the provisions of sections 380 and 381 of the Probate Code. As stated, the trial court granted the motions and sustained the demurrers.

[1] The question does not appear to have been decided in this state; and it appears from decisions from other jurisdictions that a contest filed within the statutory time enures to the benefit of an interested party who intervenes after the statutory period, and that the statute of limitations is not a defense to such a petition. Maurer v. Miller, 77 Kan. 92, 93 P. 596, 127 Am.St.Rep. 408, 15 Ann.Cas. 663; Weichold v. Day, 118 Kan. 598, 236 P. 649. To the same effect is Bradford v. Andrews, 20 Ohio St. 208, 5 Am.Rep. 645. See, also, McArther v. Allen (C.C.) 3 F. 313. In Illinois, however, the contrary was held. Brownlie v. Brownlie, 357 Ill. 117, 191 N.E. 268, 93 A.L.R. 1041. As between the two lines of decisions, we prefer to follow what seems to be the more liberal

rule declared by the Kansas and Ohio courts.

[2] In Russell v. Nelson, 317 Mo. 148, 295 S.W. 118, relied upon by respondents, the contestants, as shown by their petition, were not, under the Missouri statute, persons interested in the probate of the will; and it was held that they could not state a cause of action by an amendment adding parties plaintiff who were interested, nor would such an amendment prevent the bar of the statute of limitations. In any case, one who institutes such a proceeding or attempts to join therein must be a person interested (Probate Code § 380; In re Estate of Land, 166 Cal. 538, 137 P. 246); and the court before proceeding with the trial may require a contestant to establish the fact. (In re Estate of Land, supra; In re Estate of Wickersham, 153 Cal. 603, 96 P. 311). But, as a matter of pleading, it is only necessary that it be alleged that such person is an heir at law of the decedent. In re Estate of Benton, 131 Cal. 472, 63 P. 775.

[3] As stated, appellant, in addition to averments of her own interest in the estate (which under the decisions cited were sufficient), alleged herself to be the sole heir of the decedent. Respondents contend that, regardless of what may hereafter appear with respect to the status of contestant Ennis, appellant by this averment necessarily brought herself within the bar of the statute of limitations, and that the demurrers on this ground were properly sustained.

The allegation was equivalent to a denial that Elizabeth A. Ennis, who made a like averment herself, was the sole heir, and was an unnecessary part of the statement of her cause of action. While the fact when determined may affect her right to maintain the contest, at this stage of the proceeding it presented no material issue. Berg v. Johnson, 139 Ark. 243, 213 S.W. 393, 8 A.L.R. 489; Tew v. Wolfsohn, 174 N.Y. 272, 66 N.E. 934; Arrison v. Supreme Council, 129 Iowa, 303, 105 N.W. 580. Being surplusage she was not thereby estopped (49 Cor.Jur., Pleading, § 125, p. 126; Holtry v. Foley, 43 Neb. 133, 61 N.W. 120); and in deciding the question of the sufficiency of the pleading the allegation, considered as an evidentiary fact, must be disregarded (Jones v. City of Petaluma, 36 Cal. 230).

[4] Appellant also contends that section 384 of the Probate Code, properly construed, enlarges the right given by section 380. We think, however, that the two sections must be read together, and that the right claimed depends upon the provisions of the latter section.

[5] Nothing material appeared in appellant's answer which was not contained in her petition or complaint, and the order striking the former, if erroneous, was not prejudicial.

The judgment, therefore, in so far as it involved this order, should be affirmed. However, as to the demurrers to the complaint or petition, we think the same should have been overruled, and that upon the filing of respondents' answers thereto the question whether contestants are interested persons should first be determined.

The judgment is reversed.



21 Cal.App.2d 128

HUDDLESTON v. POUND et al.

EVANS v. SAME.

ECKERT v. SAME.

Civ. 1964–1966.

District Court of Appeal, Fourth District, California.

May 21, 1937.

1. Automobiles ⇐243(4)

The details of motorist's conduct, when he was stopped on other occasions by officer for speeding, were not material in determining whether motorist was driving recklessly when guests were killed in collision with parked automobile and approaching truck.

2. Automobiles ⇐245(38)

The extent of interference of lights of oncoming truck, and effect of interference on conduct of motorist, are usually questions of fact and not of law.

3. Automobiles ⇐244(20)

Evidence that motorist was endeavoring to avoid consequences which he thought more dangerous than the course he took, and that he was making honest effort to prevent injury rather than to cause it, war-

ranted finding that he was not guilty of willful misconduct in colliding with unlighted parked automobile and approaching truck, precluding recovery for deaths of guests in his automobile.

Appeal from Superior Court, Imperial County; Roy D. McPherrin, Judge.

Actions by John William Huddleston, and by Walter C. Evans, and by Carl F. Eckert, against Earl C. Pound and others, which were consolidated for trial. From the judgments, the plaintiffs appeal.

Affirmed.

Harry W. Horton, of El Centro, and J. Vincent Hannon, of Los Angeles, for appellants.

Francis J. Gabel, of Los Angeles, Hickcox & Trude and Hickcox & Provence, all of El Centro, and John K. Ford and Ross T. Hickcox, both of Los Angeles, for respondents.

BARNARD, Presiding Justice.

These three actions, arising out of one automobile accident, were consolidated for trial and are here submitted upon one set of briefs. In each case the court made findings in favor of the defendants, and the various plaintiffs have appealed from the respective judgments.

The three persons who met their deaths in this accident were all riding as guests of the respondent Harold Pound, who was driving a Hudson sedan owned by his parents, the other respondents. The only point raised is that the court's finding in each case to the effect that Harold Pound was not guilty of willful misconduct is not sustained by the evidence. In other words, it is contended that he must be held guilty of willful misconduct, as a matter of law.

The accident happened about 11 o'clock p. m. on July 16, 1932, on a paved highway running from El Centro to Holtville. Harold Pound, with four other young people in the car, was driving easterly toward Holtville at a speed of about 45 miles an hour. About four miles easterly from El Centro a Maxwell car, without a top and without lights, was parked on the southerly side of the highway, facing east, with its left wheels on the pavement and its right wheels on the shoulder. Harold did not see the parked car in front of him until he was about 25 or 30 feet from it. At the same time a Chevrolet truck was approaching from the east on the north side of this pavement. There was a deep borrow pit on the south side of the road which prevented him from going to the right of the Maxwell, so he put on his brakes, pulled to his left, and attempted to pass to the left of the Maxwell car. He had observed the lights of the approaching truck, and at the time he pulled over to his left he knew that that truck was fairly close to the parked Maxwell. He testified that the only thought in his mind was to miss the parked car, that he wanted to get through so nothing would happen, and that he hoped to be able to do so. The driver of the truck testified that he saw the Hudson "coming in and I got off the highway as far as I could"; that he was about 25 or 30 feet from the parked car when he started to get off the highway to his right; and that there would have been room enough for the Hudson to go between the truck and the parked car if the Hudson had not struck the Maxwell. It appears, without conflict, that the front end of the Hudson got around the Maxwell, but that its right rear end collided with the left rear end of the Maxwell, causing the rear end of the Hudson to skid to the left into the path of the truck, that the Hudson then "sideswiped" the truck, that its left rear half came in contact with the truck, and that it "started on the bumper (of the truck) at the front and went all the way back." The Hudson traveled from 50 to 85 feet after the collision.

[1] The appellants contend that as a background for the consideration of the question before us and as showing that Harold Pound's mental attitude was one of disregard for the safety of others, we must take it as established that he was a "reckless driver," since he was "repeatedly stopped by traffic officers for speeding." This is based upon the testimony of an officer that on two occasions he had stopped him for going too fast within the city limits of Brawley. The details of his conduct at those times are not before us and, of course, they have no bearing on the way he was driving on this occasion.

It is further argued that Pound knew that his eyesight was defective, that the lights of the oncoming truck obstructed his vision to the extent that he could not see objects on the road, and that "in spite of his own impaired vision and that he could not see the highway ahead of him

or objects on the same" he "deliberately turned and drove to the left and around the Maxwell car with full knowledge that the truck was coming," and at a time when the truck "was almost far enough west to be opposite the Maxwell car."

[2] While there is evidence that Harold had an astigmatism, had been advised by a doctor to wear glasses for reading, and that he was somewhat nearsighted, there is also evidence that his eye condition affected only his reading and did not interfere with his driving of a car. It also appears that he had a license to drive and that the other occupant of the front seat of his car, whose eyesight is not questioned and who was watching the road ahead, did not see the parked car until Harold started to turn out for it. Without doubt the lights of the oncoming truck would affect his ability to see to a certain extent. However, the extent of any such interference and its effect upon the conduct of a driver, even when the question of ordinary negligence is concerned, is usually a question of fact and not one of law. Skaggs v. Willhour, 210 Cal. 524, 292 P. 649.

In each case the court found that Harold Pound was driving on this occasion in a prudent manner when the parked car suddenly appeared on the highway in front of him; that the parked car was on the right and the same side of the highway upon which he was driving; that two of its wheels were on the paved portion of the highway and two off the pavement; that there was no tail-light thereon and no other lights that could be observed by him; that there was no other form of warning to make known its presence; that the parked car was without a top; that a truck was approaching from the east and in a direction opposite to that in which he was driving; that immediately upon seeing the parked car he applied his brakes and turned to the left for the purpose of avoiding a collision and for the purpose of avoiding going into a deep borrow pit on the side of the highway; that the front part of the sedan which he was driving cleared the parked car but that its right rear side came in contact with the left rear side of the parked car and the sedan was thereby swung sideways into the path of the oncoming truck; that the situation created by the parked and unlighted car and the oncoming truck placed him in a position of imminent peril; and that he exercised his best judgment and acted with a conscious effort to avoid a collision and to avoid injury to himself, his guests and others.

[3] These findings are supported by the evidence. The appellants rely particularly on the case of Sanford v. Grady, 1 Cal.App.(2d) 365, 36 P.(2d) 652, 37 P.(2d) 475. The facts of that case were substantially different, including the absence of the element of sudden peril, which here appears. It could be said here, as was said in Turner v. Standard Oil Company, 134 Cal.App. 622, 25 P.(2d) 988, 991: "It fully appears from the evidence that, at the time, he was endeavoring to avoid consequences which he thought more dangerous than the course he took, and that he was making an honest effort to prevent injury rather than to cause it." Under the circumstances appearing here it cannot be held that the finding and conclusion that no willful misconduct was shown is without support in the evidence. Meek v. Fowler, 3 Cal.(2d) 420, 45 P.(2d) 194.

The respective judgments are affirmed.

We concur: MARKS, J.; JENNINGS, J.



21 Cal.App.2d 132

PEOPLE v. LYLE et al.

Cr. 416.

District Court of Appeal, Fourth District, California.

May 21, 1937.

1. Criminal law ⇐1144(10)

Where record failed to show court's remark allegedly misinterpreting judgment, but contained copy of court's letter to parole board, which determined sentence, setting forth remark, it would be assumed that court made remark, as respects appeal raising issue whether due process was denied by alleged misinterpretation.

2. Criminal law ⇐1202(6)

Under information charging burglary and three prior felony convictions, judgment, reciting that accused pleaded guilty to burglary and admitted prior convictions alleged, supported life sentence under habitual criminal statute, notwithstanding ab-

sence of formal adjudication of being an habitual criminal (Pen.Code, § 644).

3. Criminal law ⇐1202(6)

Under habitual criminal statute, only imprisonment permissible on plea of guilty to burglary and admission of three prior felony convictions was life imprisonment without parole (Pen.Code, § 644).

4. Criminal law ⇐997

A motion that judgment be vacated and annulled amounted to application for writ of "coram nobis."

[Ed. Note.—For other definitions of "Writ of Error Coram Nobis," see Words & Phrases.]

5. Criminal law ⇐997

The original functions of writ of coram nobis have been largely superseded by statutory remedies of motion for new trial, motion to vacate judgment, motion in arrest of judgment, and appeal from judgment.

6. Criminal law ⇐997

A writ of "coram nobis" is available only where there has been denial of trial on merits or where no trial was had but plea was obtained through duress, or where trial was affected by outside force.

7. Criminal law ⇐997

Where accused was properly arraigned, pleaded guilty to burglary, and admitted three prior felony convictions, and judgment supported sentence under habitual criminal statute, accused was not entitled to vacation of judgment in proceeding amounting to application for writ of "coram nobis," because of failure to appeal through misinterpretation of judgment allegedly induced by remark of court that accused would not be adjudged an habitual criminal (Pen.Code, § 644).

8. Criminal law ⇐1202(7)

Where information fully described three prior felonies, convictions, and imprisonments, and accused admitted prior convictions and made no request for taking of evidence, accused could not complain, on appeal from refusal to vacate judgment, of sentence under habitual criminal statute because no evidence was taken establishing prior convictions (Pen.Code, § 644).

9. Criminal law ⇐997

A proceeding for writ of "coram nobis" is a proceeding to have judgment declared void and vacated.

10. Criminal law ⇐997

Where accused pleaded guilty to burglary and admitted three prior felony convictions alleged in information, and judgment supported sentence under habitual criminal statute, error, if any, in failing to take evidence establishing prior convictions could not be cured by application for writ of "coram nobis" (Pen.Code, § 644).

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Robert L. Lyle, Samuel L. Lyle (true name), was accused by information of burglary and of being a habitual criminal, was ordered by the trial court to be punished by imprisonment, and was ordered confined for life as an habitual criminal by the Board of Prison Terms and Paroles of Folsom Prison. From an order denying his motion to vacate and set aside the trial court's judgment, accused appeals.

Affirmed.

Samuel L. Lyle, in pro. per.

U. S. Webb, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

JENNINGS, Justice.

The appellant was accused by information filed in the superior court of San Diego county on February 14, 1934, of having committed the crime of burglary and also with having suffered three prior convictions of a felony, for each of which he had been sentenced to imprisonment and had served a term therefor in a penal institution. On arraignment appellant, who was represented by counsel, entered a plea of guilty of the offense charged and admitted the prior convictions alleged in the information. Thereafter on March 8, 1934, the court pronounced judgment against him. This judgment, which was entered on the minutes of the court, after reciting that appellant had entered a plea of guilty of the offense charged in the information and had admitted the three prior convictions alleged therein and that the court had determined the degree of burglary to be that of second degree, ordered that appellant be punished by imprisonment in the state prison of the state of California and that he be delivered to the warden of the state prison at Folsom. On April 4, 1936, the board of prison terms and paroles of Folsom prison determined that appellant

should be confined in said prison for life as an habitual criminal, reserving to itself the right to redetermine said term of confinement as the circumstances of the case or the prisoner's conduct might in the interest of justice require. On July 13, 1936, which was more than two years after the above-mentioned judgment was pronounced, appellant presented to the trial court a motion to vacate and set aside said judgment. The motion was denied and this appeal was thereupon taken from the order of denial.

The basis for the primary contention advanced by appellant on this appeal is the following statement allegedly made by the trial court at the time judgment was pronounced: "The court will not adjudge you to be an habitual criminal, but the judgment will be that you will be committed to the State Prison at Folsom for the term prescribed by law."

Appellant's first contention is stated by him as follows: "That the court having erroneously informed the defendant as to the true legal effect of said judgment and sentence pronounced against him, the defendant was denied the due process of law, in that relying on such information, he took no appeal from that portion of the judgment and sentence, which as construed by the Supreme Court, subjects him to the provisions of section 644 of the Penal Code as an habitual criminal."

[1] In giving consideration to this contention, it may properly be noted that the record herein fails to show that the trial court made the remark attributed to it. There is, however, included in the record a copy of a letter which was addressed to the assistant secretary of the board of prison terms and paroles by the trial judge on June 3, 1936, in which the writer referred to the receipt by the clerk of the court of a certified copy of the board's order fixing the term of appellant's confinement at life as an habitual criminal and containing the following declaration: "At the time of pronouncement of judgment I stated to him that I would not declare him an habitual criminal, and the judgment was that he be committed to Folsom State Prison for the term prescribed by law, for the crime of burglary of the second degree." It will therefore be assumed for the purposes of this appeal that at the time the judgment was pronounced the trial court made the statement attributed to it by appellant.

[2, 3] Indulgence in the assumption, however, fails to produce a conviction that the aforementioned contention is sustainable. It is apparently appellant's view that, because the trial court stated it would not declare him an habitual criminal and because in reliance thereon he did not take an appeal from the judgment within the time when such action could legally have been taken, the judgment should have been vacated by the court which rendered it, since it has now developed that its legal effect is different from what the trial court thought it would be. It is obvious that the board of prison terms and paroles correctly determined that the legal effect of the judgment was an adjudication that appellant was an habitual criminal and accordingly punishable by life imprisonment under the provisions of section 644 of the Penal Code. This is true because, although the judgment contains no formal adjudication of habitual criminality, it does nevertheless recite that appellant had admitted the three prior convictions alleged in the information and when the information is examined it appears that it is therein charged that each of such convictions was for a specified felony for which in each case appellant was punished by being confined in a specified penal institution. The omission of a formal adjudication that appellant was an habitual criminal under these circumstances did not vitiate the judgment or impair its effectiveness and the only term of imprisonment permissible under the law was imprisonment for life without parole. People v. Vaile, 2 Cal.(2d) 441, 42 P.(2d) 321.

[4-7] Apparently, although appellant did not so denominate it, his motion that the judgment be vacated and annulled amounted to an application for a writ of coram nobis. People v. Mooney, 178 Cal. 525, 528, 174 P. 325. The original functions performed by such a writ have been largely superseded by the statutory remedies of the motion for new trial, motion to vacate a judgment, motion in arrest of judgment, and appeal from judgment. People v. Superior Court, 4 Cal.(2d) 136, 47 P.(2d) 724; People v. Moore, 9 Cal.App. (2d) 251, 49 P.(2d) 615. Under our statutory forms of procedure, the writ of coram nobis is available to a defendant in a criminal proceeding only when there has been a denial of a trial upon the merits or, in other words, when there has

been no trial at all. People v. Mooney, supra; People v. Reid, 195 Cal. 249, 232 P. 457, 36 A.L.R. 1435; People v. Sandoval, 200 Cal. 730, 254 P. 893; People v. Paysen, 123 Cal.App. 396, 11 P.(2d) 431. A frequently cited example of the kind of situation in which the writ may be available is presented in the case of People v. Perez, 9 Cal.App. 265, 98 P. 870, 871, wherein the petitioner for the writ alleged that his plea of guilty to a charge of robbery had been accomplished through duress practiced upon him by the sheriff who represented to him that he was in immediate danger of mob violence which he could escape only by pleading guilty which would result in his immediate transfer to the state prison. In upholding the propriety of the procedure whereby the judgment was attempted to be vacated, the appellate court remarked that "A confession of guilt obtained by duress is void and cannot be the basis for a valid judgment." Examination of the decisions in California in which the propriety of the procedure whereby appellant sought to have the judgment pronounced against him vacated indicates that it is only where no trial was had, but a plea had been obtained from a defendant through some character of duress or where the trial was affected by some outside force that the remedy of coram nobis is available. People v. Mooney, supra; People v. Reid, supra; People v. Sandoval, supra; People v. Paysen, supra. In the instant case there is no claim that the plea entered by appellant was extorted from him by duress of any character or that the proceedings which resulted in his plea of guilt and his admission of three prior felony convictions were affected by any outside force. So far as appears from the record, appellant was properly arraigned, at which time he was represented by counsel and voluntarily entered his plea. His misconception of the legal effect of the judgment pronounced against him did not entitle him to have it vacated through the instrumentality of an application for the common-law writ of coram nobis and the trial court correctly determined that it was without jurisdiction to grant the application.

[8-10] Appellant also questions the right of the prison board to fix his term of confinement in Folsom prison at life imprisonment under the above-narrated circumstances, particularly in view of the fact that no evidence was submitted to the trial court which established the legal character of the various offenses for whose commission he had suffered the prior convictions alleged in the information. The point is devoid of merit. As heretofore noted, the information contained a full and complete description of the prior offenses, the courts wherein judgments of conviction were pronounced, the dates of said judgments, and the fact that in each instance as punishment therefor appellant served a term in a designated penal institution. Appellant expressly admitted the three prior convictions of felony which were thus described. Under these circumstances, if appellant considered that evidence was required to acquaint the trial court with the nature of the previous crimes which he had committed, the duty was imposed upon him then to submit such evidence. This he failed to do and it is now too late to complain for the first time on this appeal that evidence in which he alone was interested and which he should have presented was not submitted. It may further be observed that the mistake of which appellant complains, assuming only for the sake of argument that error was committed in the failure to take evidence respecting the nature of the prior offenses, could not be cured by an application for a writ of coram nobis. Such a proceeding constitutes an attack upon the judgment whereby it is sought to have the judgment declared void and vacated. It is obvious, however, that at the time appellant instituted the proceeding which resulted in the entry of the order from which this appeal has been prosecuted there was a valid, subsisting judgment of conviction against appellant and the trial court was without authority to annul it so far at least as any right so to do is conferred by a proceeding of this character. People v. Superior Court, 4 Cal.(2d) 136, 150, 47 P.(2d) 724; People v. Moore, 9 Cal.App.(2d) 251, 253, 49 P.(2d) 615.

The order from which this appeal has been taken is therefore affirmed.

We concur: BARNARD, P. J.; MARKS, J.

PEOPLE v. ROSEN. *

Cr. 2982.

District Court of Appeal, Second District, Division 2, California.

May 26, 1937.

Hearing Granted by Supreme Court June 24, 1937.

1. Criminal law ⇐1130(5)

A court rule requiring presentation of points separately in brief under appropriate heading is not mere technical requirement, but requires direction of court's attention to specific errors alleged, is applicable to all briefs, and will be enforced by dismissals (Rules of Supreme Court and District Courts of Appeal, rule 8, § 2).

2. Criminal law ⇐1130(5)

An accused's failure to comply with court rule requiring presentation of each point separately in brief under appropriate heading required dismissal of appeal (Rules of Supreme Court and District Courts of Appeal, rule 8, § 2).

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Dave Rosen was convicted of robbery of the first degree, and he appeals.

Appeal dismissed.

A. H. McConnell, of Long Beach, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

CRAIL, Presiding Justice.

The defendant appeals from a conviction of robbery of the first degree and from an order denying his motion for a new trial.

The defendant in his brief has failed to comply with rule VIII, section 2, of Rules of the Supreme Court and District Courts of Appeal, which requires that he "must present each point separately under an appropriate heading, showing the nature of the question to be presented or the point to be made."

[1, 2] In the case of Sun Lumber Company v. Bradfield, 122 Cal.App. 391, 393, 10 P.(2d) 183, 184, it was said, "This rule applies to all briefs, regardless of length or number of points involved, and, under the provisions of the rule, failure to comply therewith may result in a dismissal of the appeal. This rule has been in effect for many years, and has been called to the attention of the bar in numerous opinions. Dismissals may be required to compel its observance." The rule is not a mere technical requirement adopted without plan or purpose but was prescribed for the purpose of requiring the parties to direct the court's attention to specific errors of law alleged to have been committed by the trial court. The headings must show the nature of the question to be raised, thus facilitating the disposition of cases upon appeal. Graybeal v. Press-Telegram Pub. Co., 14 Cal.App.(2d) 252, 57 P.(2d) 1343; Battson v. Kirkpatrick, 11 Cal.App.(2d) 283, 53 P.(2d) 762; Bernstein v. Congregation Anshi, 14 Cal.App.(2d) 96, 57 P.(2d) 954; People v. Knight, 63 Cal.App. 63, 218 P. 79. This court has been enforcing this rule.

For the reason stated the appeal will be dismissed.

I concur: McCOMB, J.

*For subsequent opinion see 78 P.2d 727.

WESTERN MACHINERY CO. v. BANKERS INDEMNITY INS. CO. †

Civ. 10226.

District Court of Appeal, First District, Division 1, California.

May 21, 1937.

Hearing Granted by Supreme Court July 19, 1937.

1. Insurance ⇐435

Under public liability policy authorizing use of assured automobiles for "business calls," words "business calls" should be interpreted in their ordinary sense.

2. Insurance ⇐435

The provision of a public liability policy that assured automobiles would not be used to carry passengers for consideration, actual or implied, did not conflict with provision authorizing use of assured automobiles for business calls, and no uncertainty or ambiguity is created thereby.

3. Insurance ⇐146(1)

Where terms of policy are plain, court can indulge in no forced construction to

†For subsequent opinion see 75 P.2d 609.

cast liability on insurer which insurer has not assumed.

4. Insurance ⇐153

In action on public liability policy providing that assured automobiles would not be used to carry passengers for consideration, actual or implied, but might be used for "business calls," testimony as to sense in which the trade understood provision for "business calls," or what was customarily done in making business calls, was not admissible, since provision authorizing use of assured automobiles for "business calls" clearly restricted use to class to whom assured owed no higher duty than to guest (St.1931, p. 1693, § 141¾).

5. Insurance ⇐435

Liability insurer has right to specify conditions under which it will insure.

6. Insurance ⇐435

One may be an automobile "passenger for hire" in absence of money consideration for the carriage, it being sufficient that some benefit or advantage or profit inures to carrier.

[Ed. Note.—For other definitions of "Passenger for Hire," see Words & Phrases.]

7. Insurance ⇐435

The liability of insured for injury to person transported by insured to inspect machinery which insured desired to sell was not covered by a public liability policy providing that assured automobiles were not to be used to carry "passengers for consideration," actual or implied, although policy authorized use of automobiles for "business calls," since benefit sufficient to constitute a "consideration" within meaning of policy was present (St.1931, p. 1693, § 141¾; Civ.Code, §§ 2608, 2610).

8. Insurance ⇐435

A public liability policy provision that assured automobiles would not be used to carry passengers for consideration constituted a warranty against such carriage (Civ. Code, §§ 2608, 2610).

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by the Western Machinery Company against the Bankers Indemnity Insurance Company. Judgment for plaintiff, and defendant appeals.

Reversed.

Charles B. Morris, of San Francisco (Leo J. McEnerney, of San Francisco, of counsel), for appellant.

Arthur P. Shapro and Alfred C. Skaife, both of San Francisco, for respondent.

PER CURIAM.

The above action was brought to recover upon a public liability insurance policy for a loss sustained by plaintiff by reason of a payment in settlement of a claim for damage caused by the negligence of an employee in the operation of one of its automobiles. The trial court entered judgment for plaintiff, from which the defendant appeals.

The policy provided that subject to the "exclusions and the conditions" therein the insurer agreed to "pay on behalf of the assured all sums (within the limits as expressed in the declarations) which the assured shall become obligated to pay by reason of the liability imposed by law upon the assured for damages, including consequential damages, resulting from loss of services and expenses arising out of bodily injuries, or death resulting therefrom, accidentally suffered or alleged to have been suffered by any person or persons by reason of the ownership, maintainence and/or use of any of the automobiles described in said declarations. * * *" One of the clauses under the caption "Exclusions" provided that "the company shall not be liable under this policy for claims arising from any accident or alleged accident of any kind unless the accident or alleged accident occurs within the policy period, or claims arising from the use of any automobile for purposes other than those specified in the declarations." Also that, "This policy is subject to the following conditions:" Following this it was provided that "the premium is based upon the number and character of the automobiles, and the uses to which the same are put, as described in the declarations herein." Another clause, numbered 11, provided that "none of the assured automobiles are or will be used to carry passengers for a consideration, actual or implied. * * *"

The trial court found that at the time of the accident the injured person was an employee of the Union Paving Company, who was being transported by plaintiff to enable him to inspect certain machinery which

plaintiff desired to sell, and subsequently did sell, to the paving company; further, that such transportation was for a business call in connection with plaintiff's business; and that the injured person was riding as a passenger pursuant to such call. The court concluded that the automobile was not being used to carry a passenger for a consideration, actual or implied, within the meaning of the policy.

The question presented by this appeal is whether, in view of the facts, the insured is covered for a loss sustained to satisfy its liability to the passenger for the damage that the latter suffered.

[1-5] The owner of the automobile was liable to a passenger for hire for failure to use ordinary care in its operation, while as to a guest mere want of such care would be insufficient to sustain an action for damages, it being necessary to further prove intoxication or willful misconduct. Vehicle Act (St. 1923, p. 517) § 141¾ (added by St. 1929, p. 1580), Amendments of 1931, Stats. 1931, p. 1693. The policy expressly provided that the rate was based upon the uses to which the automobiles were to be put as described in the declarations, one of which was that, although the same might be used for personal pleasure and family use, "including business calls," none might be used to carry passengers for a consideration, expressed or implied. The words "business calls" should, we think, be interpreted in their ordinary sense. Wilmarth v. Pacific Mut. Ins. Co., 168 Cal. 536, 143 P. 780, Ann.Cas.1915B, 1120. There thus appears to be no uncertainty or ambiguity in the language of the policy; and it cannot fairly be said that there is a conflict between this and the provision forbidding the carriage of passengers for a consideration. Where the terms of a policy are plain, the court can indulge in no forced construction to cast a liability upon the insurer which it has not assumed. Ogburn v. Travelers Ins. Co., 207 Cal. 50, 52, 276 P. 1004. The meaning being plain, there was no justification for the admission of testimony as to the sense in which the trade understood the provision, or what was customarily done in making business calls. The latter provision clearly restricted the use of the automobile to the class of persons to whom the assured owed no higher duty than to a guest. The insurer has the right to specify the conditions under which it will insure (Sears v. Illinois Indemnity Co., 121 Cal.App. 211, 9 P.(2d) 245), and provisions similar to the one here in question have been considered in a number of cases. In Neilson v. American Mutual Liability Ins. Co., 111 N.J.Law, 345, 168 A. 436, a policy covered automobiles while used for "pleasure, business and commercial transportation of materials," but contained a declaration that the cars would not be used for carriage of passengers for a consideration, expressed or implied. The latter provision was held to be a promissory warranty, compliance with which was essential to recovery. A similar case is Beatty v. Employers' Liability Assurance Co., 106 Vt. 25, 168 A. 919. So in Orient Insurance Co. v. Van Zant-Bruce, etc., Co., 50 Okl. 558, 151 P. 323, a provision that during the term of the policy the automobile "shall not be used for carrying passengers" was held to constitute a promissory warranty, a breach of which prevented recovery.

Statements in policies which import that it is intended to do or not to do a thing which materially affects the risk is a warranty that such act or omission shall occur (Civ.Code, § 2608), and a violation of such a warranty on the part of either party entitles the other to rescind. Civ.Code, § 2610.

[6-8] It is not necessary, in order to constitute one a passenger for hire, that there be a money consideration for the carriage; it being sufficient that some benefit or advantage or profit shall inure to the carrier. Champagne v. Hamburger & Sons, 169 Cal. 683, 147 P. 954; Crawford v. Foster, 110 Cal.App. 81, 293 P. 841; Sullivan v. Richardson, 119 Cal.App. 367, 6 P.(2d) 567; Royal Finance Co. v. Miller (C.C.A.) 47 F.(2d) 24; Haney v. Takakura, 2 Cal. App.(2d) 1, 37 P.(2d) 170. It is manifest that a benefit sufficient to constitute a consideration within the meaning of the policy was present; and we are satisfied that the provision with respect to the carriage of persons under the circumstances here shown was not ambiguous or uncertain. It materially affected the risk, and was a warranty that no such act would take place.

The judgment is accordingly reversed.

21 Cal.App.2d 109

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al. v. HAZELBUD et al.

Civ. 1848.

District Court of Appeal, Fourth District, California.

May 20, 1937.

Hearing Denied by Supreme Court July 19, 1937.

1. Trusts ⇐1

The existence of a trust is not defeated because of debtor-creditor relationship between part or all of parties.

2. Trusts ⇐34(1)

An agreement that bank and trust company should hold deposits in savings account in trust for depositor during his lifetime and at his death for his sister constitutes a "trust," notwithstanding existence of debtor-creditor relationship between parties.

[Ed. Note.—For other definitions of "Trust," see Words & Phrases.]

3. Trusts ⇐1

An alleged violation of statute prohibiting trustee from using property for his own profit will not defeat otherwise complete right of sister under agreement that bank and trust company should hold deposits in savings account in trust for depositor during his lifetime and at his death for his sister (Civ.Code, § 2229).

4. Trusts ⇐59(1)

A statute providing for revocation of will by subsequent marriage does not warrant revocation, after depositor's marriage, of trust agreement naming sister as beneficiary of deposits in savings account (Probate Code, § 70).

5. Husband and wife ⇐273(1)

Under statutes, widow is entitled to one-half of community funds deposited by husband in savings account pursuant to trust agreement naming husband's sister as beneficiary of deposits remaining on husband's death (Probate Code, §§ 70, 201).

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

Proceeding by the Bank of America National Trust & Savings Association, a national banking association, and another against Lois Fay Hazelbud, otherwise known as Lois Fay Hazelbud Morris, and Anna Hazelbud, otherwise known as Anna Niebuhr Hazelbud, the latter of whom filed a cross-complaint. From the judgment, Anna Hazelbud, otherwise known as Anna Niebuhr Hazelbud, appeals.

Affirmed.

Irvine P. Aten, of Fresno (Richard Aten, of Fresno, of counsel), for appellant.

Harvey & Johnston, of Bakersfield, for respondent Bank.

Chester R. Andrews, of Fresno, for respondent Morris.

BARNARD, Presiding Justice.

Ivan Blair Hazelbud opened a savings account in a bank at Bakersfield on October 9, 1928. In opening the account the bank took his signature on a printed card headed "Trust Fund Savings Account" by the terms of which he agreed that all savings deposited in this account and the dividends thereon should be governed by the by-laws of the bank, and he appointed the bank "trustee under the terms of the trust set forth on the reverse side of this card." On the reverse side of the card was the following: "All deposits to the credit of this account shall be held by United Security Bank and Trust Company in trust to pay such deposits with the accrued interest to me, or to such person as I during my life by my written order shall designate, and at my death to pay the undrawn balances of such deposits and interest to Lois Fay Hazelbud (sister) herein called beneficiary, if living, otherwise to (none) herein called alternate. My written order shall be a complete discharge in favor of the Bank for the amount paid pursuant to such order."

Hazelbud died on October 2, 1934, leaving a widow, Anna Hazelbud, to whom he was married on September 12, 1931.

It was stipulated, and found by the court, that the said Ivan Hazelbud made additional deposits in said account and withdrew money therefrom from time to time; that he kept in his possession at all times a pass or savings account book which was in the ordinary form and which contained no mention of any trust account; that the bank had no signature of any one else who was authorized to draw from this account; that Lois Fay Morris had no knowledge of said account or of the trust agreement referred to until after the death of Ivan Hazelbud; that all funds deposited in said account were commingled by the bank with funds depos-

ited in other savings accounts and loaned by the bank in connection with the funds of other savings accounts in the usual manner; that the bank collected any interest possibly earned on said moneys and kept the profit, if any, over the regular interest paid on savings accounts; that the bank neither charged nor received any fee for acting as such trustee; and that the bank paid to Ivan Hazelbud on this account the regular interest it paid on other savings deposits.

The bank began this proceeding asking the court to determine whether it, as executor of the will of Ivan Hazelbud, should take over this savings account or whether the money so deposited should be paid to Lois Fay Morris, the sister. By appropriate pleadings the sister and the widow set up their respective claims. After a hearing, the trial court held that the widow was entitled to one-half of that part of this account which had come from the community funds of herself and the deceased and that the sister was entitled to the balance of the account as the beneficiary of the trust. From the judgment which followed the widow has appealed.

[1, 2] The appellant's first contention is that the agreement under which this account was opened did not constitute a trust but established merely a debtor and creditor relationship between the parties since it provided for the payment of interest on the amounts deposited and thus impliedly gave the bank the right to use the funds for its own purposes. The appellant cites certain cases from other jurisdictions, including Bair v. Snyder County State Bank, 314 Pa. 85, 171 A. 274; Andrew v. Presbyterian Church, 216 Iowa, 1134, 249 N.W. 274, and In re State Bank of Elkhorn, Neb., 129 Neb. 506, 262 N.W. 15. While the facts in those cases may be distinguished in a number of respects from those now before us, it must be conceded that they furnish support for the contention that a trust relationship and a debtor and creditor relationship cannot exist between the same parties with respect to the same obligation. However, a different rule prevails in this state, and from a considerable line of decisions we think it must be taken as established here that the existence of a trust is not defeated, under such circumstances as those now before us, because a debtor and creditor relationship also exists between part or all of the parties.

As was said in American Bible Soc. v. Mortgage Guar. Co., 217 Cal. 9, 17 P.(2d) 105, 107: "It has become the well-established law of this state that where funds have been deposited by one person with the intent to pass a present proprietary interest therein to another jointly with himself with right of survivorship, and the purpose fails, that is, the gift is incomplete by reason of some technicality in the law and where the essential elements of a trust are established, the manifest intention of the donor may be sustained through the agency of a trust."

The rule there set forth was followed in Booth v. Oakland Bank of Savings, 122 Cal. 19, 54 P. 370, 371; Drinkhouse v. German S. & L. Soc., 17 Cal.App. 162, 118 P. 953; Culver v. Lompoc Valley Sav. Bank, 22 Cal.App. 379, 134 P. 355, 371; Williams v. Savings Bank of Santa Rosa, 33 Cal.App. 655, 166 P. 366; Carr v. Carr, 15 Cal.App. 480, 115 P. 261, and Halsted v. Central Savings Bank, 36 Cal.App. 500, 172 P. 613.

In Booth v. Oakland Bank of Savings, supra, the court said:

"There can be no doubt of the intention of Mrs. Bell in this matter, and that intention should be consummated if the law will permit it; and, if there is any ground upon which the evidence would justify a judgment in favor of the plaintiffs, the motion for a nonsuit should have been denied.

"The evidence falls far short of establishing a completed gift from Mrs. Bell to the plaintiffs; and, although there are features in the case resembling a gift causa mortis, there are other features which distinguish it from such a gift. But these need not be discussed, as there was evidence offerred on behalf of the plaintiffs to show that Mrs. Bell purposed to create a trust for the benefit of the plaintiffs, and that the trust was accepted by the bank."

In all of the cases just cited a debtor and creditor relationship existed between a bank as trustee and the trustor, and also between the trustee and the beneficiary during the life of the trustor. It was, nevertheless, held in each case that a voluntary trust existed with the bank as trustee. So far as the point now raised is concerned, there is no difference in principle between these cases and the case now before us. In fact, in the respect under consideration, the instant case is stronger than the cases mentioned since here a debtor and creditor relationship, as between the bank and the respondent sister, could not arise until after the death of the trustor.

That the rules laid down in the line of cases referred to, beginning with Booth v. Oakland Bank of Savings, supra, should be applied under the facts here appearing, is supported by the language and reasoning of two other cases in this state. In Sprague v. Walton, 145 Cal. 228, 78 P. 645, 647, where a husband shortly before his death, signed two orders authorizing certain banks to allow his wife to draw money from his accounts therein and to have the right of survivorship, the court said:

"Even if it should be found that it was not the intention of Moses Sprague that his wife should draw out the deposits, or change them to her own account in his lifetime, the form of the orders ('with right of survivorship') indicates his intention that she should take them as survivor after his death, and, if such was his intention, the transaction would be brought within the doctrine of Booth v. Oakland Bank, 122 Cal. 19, 54 P. 370, where it was held that an arrangement substantially the same as in this case constituted the bank a trustee of the deposit for the benefit of the parties to whom the depositor desired the money to be paid in case of her death."

In American Bible Soc. v. Mortgage Guar. Co., supra, where an elderly lady purchased two mortgage certificates, each of which was issued in the name of herself and a corporation as joint tenants, and where it clearly appeared that she intended to retain the right to use the principal and interest thereof during her lifetime and that the corporation named therein should have any part thereof which remained after her death, the court refused to pass upon the question as to whether a joint tenancy with the right of survivorship could be created between an individual and a corporation, and held that in each instance a trust was created with the corporation as beneficiary. In that case the court said:

"The salient features of the present case are not substantially different from the facts bearing on the creation of a trust in the case of a deposit of funds in a bank and constituting the bank a trustee. In each situation funds are paid to the trustee, giving rise to a debtor relationship on the part of the latter with some one or more persons, although in the present case that relationship arises by virtue of the defendant mortgage company's guarantee, and the obligation is evidenced by a 'First Mortgage Certificate' instead of a passbook. In each case the gift is prevented from being completed by the retention of the evidence of title by the donor. In each case the exercise by the donee of rights of ownership or dominion over the jointly owned property, in the one case of the joint right of withdrawal of the deposit or any part thereof and in the other of its right of sale and collection of interest, is prevented by that retention. * * *

"The clear intent of the donor to create an estate for the benefit of the plaintiffs respectively as survivor to the whole of said certificates having been ascertained, and the other essential elements also being present or conceded, the cases herein cited compel the conclusion that such intent must be given effect as the declaration of a trust for their benefit as to the whole of said certificates."

[3] It is argued that the transaction before us could not constitute a trust for the reason that the purported trust agreement contemplated that the bank would use the funds deposited, on which it agreed to pay interest, and that such a use is forbidden by section 2229 of the Civil Code. This part of the question seems not to have been raised in the cases above cited. This Code section has nothing to do with the creation of a trust but merely sets forth one of the obligations or duties of a trustee. The record does not disclose whether or not a profit was made on this account, but if it be assumed that the trustee violated its duty in this respect, such a violation could not affect the right of the beneficiary to receive the trust estate. As we have pointed out, trusts of this general nature have long been upheld in this state. The right to provide for a beneficiary in such manner is so thoroughly established as to have become a rule of property and, under these circumstances, it cannot be held that any such violation of section 2229 of the Civil Code will defeat the right of the beneficiary after the conditions of the trust have been fulfilled and the beneficiary's right to the money is otherwise complete. We conclude that, under the facts here appearing, the relationship between the parties was not merely that of debtor and creditor, but that a trust was also created with the sister as beneficiary.

[4] It is next urged that if it be held that a trust was created in favor of the sister such trust was revoked by the trustor's marriage three years after the opening of the account. It is argued that every reason which exists for the revocation of a will by a subsequent marriage also obtains for the revocation of a trust of this nature, and that section 70 of the Probate Code should be so

extended by judicial interpretation as to govern here. While the arguments advanced might well appeal to a legislative body, the statute in question is clear and plain and cannot be thus extended by any reasonable interpretation.

[5] Finally the appellant contends that she is entitled to all of that part of this bank account which came from community funds deposited therein. It was stipulated as to what part of this account was community funds and what part was separate property. It is argued that under section 172 of the Civil Code the deceased could not make a gift of this community property and that under section 201 of the Probate Code this surviving spouse is entitled to all thereof. Similar questions were considered and decided in Trimble v. Trimble, 219 Cal. 340, 26 P.(2d) 477, and Travelers' Ins. Co. v. Fancher, 219 Cal. 351, 26 P.(2d) 482. In so far as the question presented is concerned, we can see no difference in principle between a provision for a beneficiary through the purchase of a life insurance policy and one through such a trust as this. In our opinion, the rules established by the cases cited are controlling here.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.



21 Cal.App.2d 151

SWEARINGEN v. DILL.

Civ. 11381.

District Court of Appeal, Second District, Division 2, California.

May 26, 1937.

Rehearing Denied June 17, 1937.

Hearing Denied by Supreme Court July 22, 1937.

1. Appeal and error ⇐931(1)

An appellate court takes evidence in light most favorable to prevailing party in trial court.

2. Appeal and error ⇐842(7)

Where evidence was conflicting as to negligence of defendant and contributory negligence of plaintiff, weight of evidence was fact question for trial court and not question of law for appellate court.

3. Appeal and error ⇐692(1)

Where question to which objection was sustained did not indicate what answer would be, no offer of proof was made as to what it would be, and there was nothing in record to indicate that answer would have been beneficial to appellant, appellate court would not reverse judgment, since there must be showing of prejudice in record to justify reversal of a judgment.

4. Workmen's compensation ⇐2234

The admission, contrary to statute, of testimony as to plaintiff's earning capacity after having received evidence as to amount of medical expenses and compensation paid by insurance carrier, was not error, where record disclosed that parties had stipulated that state compensation fund had paid certain compensation and medical expenses and there was no showing that stipulation was solely for purpose of fixing amount of lien to which carrier would be entitled in case of judgment for plaintiff (Gen.Laws 1931, Act 4749, § 26).

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Action by Ralph H. Swearingen against Carolyn Dill. From judgment in favor of the plaintiff, the defendant appeals.

Affirmed.

Gibson, Dunn & Crutcher (by Philip C. Sterry), all of Los Angeles, for appellant.

Charles L. Nichols, Gerald F. H. Delamer, and Carleton B. Wood, all of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This is an appeal from a judgment in favor of the plaintiff in an action to recover damages for injuries sustained when his motorcycle and the defendant's automobile collided.

[1, 2] The defendant's first contention is that there is insufficient evidence to sustain a finding of defendant's negligence. To sustain this contention she points out a conflict between the testimony of the plaintiff and that of other witnesses and argues that plaintiff's testimony must be erroneous. Taking the evidence in the light most favorable to the losing party (which is directly contrary to the rule on appeal) and assuming that the facts are as defendant contends them to be, she ar-

gues that the defendant could not be guilty of negligence. Here is no question of law for this court to decide on appeal—the fact finder found the facts to be against her.

The defendant's next contention is that the finding of plaintiff's freedom from contributory negligence is wholly unsupported by the evidence. In support of this contention the defendant again argues the weight and value of the evidence and makes dubious computations in feet and seconds. This again turns out to be a question of fact for the trial court and not a question of law for this court.

[3] A witness testified that she was riding in the front seat of the automobile which was following defendant's car; that she saw the collision take place; that she had not driven automobiles herself but had ridden in them and had occasion to glance at speedometers from time to time, and that she had formed an opinion of the speed of plaintiff's motor cycle at the time she first saw it. She was then asked the question: "Will you state what that opinion is?" The trial court sustained an objection on the ground that no adequate foundation had been laid. This ruling is the subject of defendant's next complaint. The question did not indicate what the answer would be and no offer of proof was made as to what it would be. There is nothing in the record to indicate that the answer would have been beneficial to defendant. There must be a showing of prejudice in the record to justify the reversal of a judgment. Abrams v. Hubert, 10 Cal.App.(2d) 404, 407, 51 P.(2d) 884.

[4] Finally, the defendant contends that "the court erred in permitting testimony as to plaintiff's earning capacity after having received evidence as to the amount of medical expense and compensation paid by the insurance carrier and in awarding plaintiff damages in the amount of his lost earnings. * * * The language of the statute is perfectly plain and means exactly what it says: 'If the employee joins in or prosecutes such suit, *either* the evidence of the amount of disability * * * paid or to be paid by the employer or the evidence of loss of earning capacity by the employee shall be admissible, *but not both* * * *.' (Deering's Gen. Laws 1931, Act 4749, § 26, vol. 2, p. 2295.)" The record discloses that during the trial the parties stipulated that the state compensation fund had paid certain compensation and certain medical expenses to the plaintiff. This was the so-called evidence. The defendant fails to disclose that the stipulation was solely for the purpose of fixing the amount of lien to which the compensation carrier would be entitled in case judgment was rendered in favor of the plaintiff, and that the court said the evidence would be used for no other purpose. Furthermore, the defendant's own counsel expressly stated to the court prior to the ruling of the court that he did not think the defendant was prejudiced by the introduction of this evidence and thus invited the court to make the ruling which it did.

Judgment affirmed.

I concur: McCOMB, J.



21 Cal.App.2d 5

BOARD OF EDUCATION OF CITY OF LOS ANGELES v. BALLOU.

Civ. 11358.

District Court of Appeal, Second District, Division 2, California.

May 17, 1937.

1. Officers ⇐72(1)

The removal of a public employee from position of employment is essentially an administrative matter.

2. Schools and school districts ⇐141(1)

A school teacher is an "employee" and not an "officer," as respects his removal.

[Ed. Note.—For other definitions of "Employee" and "Officer," see Words & Phrases.]

3. Schools and school districts ⇐141(2)

The removal of a school teacher is an administrative act, notwithstanding statutory requirement that removal can be had only after charges are preferred and heard (School Code, § 5.650 et seq., as amended by St.1935, p. 1886 et seq.).

4. Officers ⇐72(1)

In removing public employee for cause, charges need not be prepared with formality necessary in indictment.

5. Officers ⇐72(1)

Charges against public employee sought to be removed are sufficient if made in simple language and broad enough fairly to advise employee of their nature.

6. Schools and school districts ⇐141(5)

A complaint charging school teacher sought to be removed under statute, with lack of knowledge of subject-matter, lack of organization, lack of control of pupils, failure to control his temper, lack of courtesy, failure to accept suggestions and to co-operate with coworkers and lack of self-control, is sufficient notice of charges against teacher (School Code, § 5.650 et seq., as amended by St.1935, p. 1886 et seq.).

7. Schools and school districts ⇐141(5)

Under statute, complaint of governing board need not formulate dismissal charges against teacher in its own language, but can set forth charges filed with board (School Code, § 5.650 et seq., as amended by St.1935, p. 1886 et seq.).

8. Schools and school districts ⇐141(5)

A notice charging school teacher with incompetency consisting of lack of knowledge of subject-matter, lack of organization, lack of control of pupils, failure to control his temper, lack of courtesy, failure to accept suggestions and co-operate with coworkers and lack of self-control is sufficient compliance with statutory requirement that teacher be given notice of incompetency prior to filing of dismissal proceedings (School Code, § 5.652, as amended by St.1935, p. 1886).

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Proceeding by the Board of Education of the City of Los Angeles against Fredric Ellsworth Ballou. From a judgment of dismissal, the plaintiff appeals.

Reversed, with direction.

Everett W. Mattoon, Co. Counsel, and W. B. McKesson and S. V. O. Prichard, Deputies Co. Counsel, all of Los Angeles, for appellant.

John A. Gilligan, Hallam Mathews, and Theodore W. Russell, all of Los Angeles, for respondent.

WOOD, Justice.

Plaintiff appeals from a judgment of dismissal entered upon the sustaining of defendant's demurrer without leave to amend. The complaint was filed under the provisions of section 5.650 et seq. of the School Code (as amended by St.1935, p. 1886 et seq.) wherein are provided proceedings for dismissal of permanent teachers. In its complaint the plaintiff board set forth that it is the governing board of the Los Angeles city high school district; that defendant is a permanent teacher of the district; that notice of incompetency had been served upon defendant and that written verified charges had been filed with the plaintiff board; that defendant had demanded a hearing upon the charges in accordance with the provisions of the School Code.

Defendant contends that the charges set forth in the complaint constitute mere conclusions and that they fail to give notice to defendant of the charges against him "with sufficient definiteness" to enable him to prepare a defense. It is charged in the complaint that defendant "demonstrated in the classroom a lack of knowledge of the subject matter of architectural drawing, which said subject he was assigned to teach, which lack of subject matter resulted in said defendant being rated as unsatisfactory as a teacher; * * * demonstrated a poor organization of the classroom materials, which lack of organization of the classroom materials resulted in the pupils getting far behind in the work assigned to the class and resulted in the home room work remaining uncompleted for several weeks; * * * lost control of the class and the students caused confusion by their noise and failure to settle down to work, all of which was known to the defendant and not corrected by him; that defendant lacked ability to properly discipline the pupils under his control, and on frequent occasions indiscriminately penalized pupils without just cause, all of which resulted in dissatisfaction among the pupils and demonstrated his lack of ability to maintain proper classroom discipline * * *; lost his temper in the presence of the class; * * * insulted pupils and harshly criticised them in the presence of their fellow pupils; * * * failed and refused * * * to accept the suggestions and directions of the principals, assistant superintendents and supervisors of the work, who were his immediate superiors, in the manner in which he should present his subject to the pupils and in the method of proper handling of the classroom; * * * demonstrated such lack

of self-control in the presence of the pupils by permitting himself to become annoyed, irritated and aggravated while in the classroom."

The Legislature in 1935, by amending the School Code, brought about very significant changes in the procedure for dismissing permanent teachers for cause. Administrative school officials were deprived of the power to dismiss permanent teachers for cause and it was made necessary for the governing board, in order to bring about a dismissal, to file a complaint in the superior court "asking that the court inquire into such charges and determine whether or not such charges are true, and if true, whether or not they constitute sufficient grounds for the dismissal of such employee, under the provisions of this code, and for judgment pursuant to its findings." The Legislature has placed upon the judges the duty of determining whether a teacher should be dismissed when charges such as incompetency are filed. A duty essentially administrative has been withdrawn from administrative officials and imposed upon officials exercising judicial functions. It is to be hoped that the Legislature will not be prevailed upon to extend this duty so that the courts will be compelled to pass upon all of the charges that may be filed against the civil service employees of the state and its various political subdivisions.

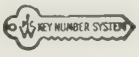
[1-7] The removal of an employee from his position of employment is essentially an administrative matter. A school teacher is an employee rather than an officer. Kennedy v. Board of Education, 82 Cal. 483, 22 P. 1042; Weiser v. Payne, 110 Cal.App. 378, 294 P. 407. The removal remains an administrative act notwithstanding the legal prerequisite that it can be brought about only after charges are preferred and heard. In removing an employee for cause, it is not necessary that the charges be prepared with all the formalities that are necessary in an indictment. Such charges are sufficient if they are made in simple language and are broad enough to fairly advise the employee of their nature so that he can properly prepare a defense thereto. McQuillan on Municipal Corporations (2d Ed.) § 588; People v. Thompson, 94 N.Y. 451. The charges made in the complaint, and above set forth, are sufficient to advise defendant in what respect it is claimed that he is incompetent and unfit to continue in his employment. It is to be noted that the School Code does not require that the board formulate the charges in its own language. The requirements of the code may be met if the board files a complaint setting forth the charges which had been filed with the board.

[8] Defendant contends that he was not given the notice prescribed by section 5.652 of the School Code (as amended by St.1935, p. 1886). This section is as follows: "Governing boards of school districts shall not act upon any charges of incompetency other than incompetency due to physical or mental disability unless during the preceding term or half school year prior to the date of the filing of such charge, and at least ninety days prior to the date of such filing, the board or its authorized representative shall have given the employee against whom the charge is filed, written notice of such incompetency, specifying the nature thereof with such particularity as to furnish the employee an opportunity to correct his faults and overcome his incompetency." Within due time plaintiff gave to defendant the following notice: "Please be informed that at a meeting of the Board of Education of the City of Los Angeles on January 23, 1936, the Board adopted a report of its Superintendent and Teachers and Schools Committee recommending that you be classified as an incompetent teacher, and that you be notified *by our* incompetency, such incompetency having resulted from your manifestation of the following qualities, towit: 1. Lack of proper knowledge of the subject matter of the school work that you are attempting to teach. 2. Lack of proper organization of your school work. 3. Lack of proper control or discipline of pupils. 4. Failure to control your temper in disciplining pupils. 5. Lack of courtesy in your contact with pupils and co-workers. 6. Failure to accept suggestions and cooperate with principal and co-workers; and 7. Lack of self control in presence of pupils. Pursuant to the above mentioned Board action and to the provisions of section 5.652 of the School Code, you are accordingly hereby respectfully notified of your incompetency." Section 5.652 requires that the notice specify the "nature" of the alleged incompetency with sufficient particularity to furnish the employee an opportunity to correct his faults. It is not required that any particular facts or episodes be set forth in the notice. Defendant was given sufficient notice of the charges against him to enable him to over-

come his deficiencies if he had the ability and desire to do so. Counsel for plaintiff aptly suggests that the governing board notified defendant to study more, plan more, control his temper, be more polite, be more co-operative, and be more self-controlled. The notice was a sufficient compliance with section 5.652 of the School Code. According to the charges contained in the complaint, defendant did not profit by the admonition contained in the notice. In our view, the complaint states a cause of action.

The judgment is reversed and the superior court is directed to overrule the demurrer.

We concur: CRAIL, P. J.; McCOMB, J.



21 Cal.App.2d 171

MOODY v. BOARD OF TRUSTEES OF WHITTIER CITY SCHOOL DIST. IN LOS ANGELES COUNTY et al.

Civ. 11349.

District Court of Appeal, Second District, Division 2, California.

May 26, 1937.

1. Schools and school districts ⇐141(5)

A permanent teacher dismissed by school board may apply to Superior Court for review of action of board in removing her (School Code, § 5.404).

2. Schools and school districts ⇐141(5)

The trial before Superior Court to review action of school board in removing permanent teacher is trial de novo, wherein Superior Court must weigh and consider all evidence presented and make appropriate findings thereon without reference to decision of board as to merits of charges made against teacher, and rule against disturbing finding of nisi prius court sustained by substantial evidence is not applicable (School Code, § 5.404).

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Anna Mae Moody against the Board of Trustees of the Whittier City School District, in the county of Los Angeles, state of California, and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Everett W. Mattoon, Co. Counsel, and W. B. McKesson, Deputy Co. Counsel, both of Los Angeles, for appellants.

Tanner, Odell & Taft, of Los Angeles, for respondent.

McCOMB, Justice.

Defendants appeal from a judgment in favor of plaintiff after trial before the court without a jury in an action requesting her reinstatement as a teacher and requiring defendant school district to pay her a salary in the sum of $150 per month for September, October, and November, 1934.

The material facts are these:

Plaintiff, a permanent teacher employed by defendant school district, was suspended by the board of trustees on March 30, 1934.

August 31, 1934, after a hearing before the board of trustees, said board sustained the discharge of plaintiff. She thereafter appealed to the state superintendent of public instruction, and he confirmed the action of the board of trustees in dismissing her.

Plaintiff then filed a petition in the superior court for a writ of mandate to compel defendant board of trustees to reinstate her as a permanent teacher of defendant school district. After a full and fair trial, the superior court found the charge that plaintiff had persisted in violating a rule adopted by defendant school district prohibiting teachers from inflicting corporal punishment upon pupils under their charge was not true.

This is the sole question presented for determination:

Was there substantial evidence to sustain the trial court's finding that the board of trustees of defendant school district had not adopted a rule prohibiting teachers of the district from inflicting corporal punishment upon pupils under their charge?

[1, 2] This question must be answered in the affirmative. The law is settled that under the 1929 School Code, which, as amended, was in effect when the facts in the present case transpired, a permanent teacher dismissed by a board of trustees, may apply to the Superior Court for a review of the action of the school board in removing her. School Code, 1929, § 5.404. It is likewise settled that the discharged teacher has the

right to have the Superior Court determine the truth of the charges preferred against her without reference to the decision of the board of trustees as to the merits of said charges; in other words, the trial before the Superior Court is de novo and it is the duty of the trial court to weigh and consider all evidence presented and make appropriate findings thereon. The more restrictive rule which governs when a court is acting in an appellate capacity is inapplicable, to wit, that, if there is any substantial evidence to sustain the finding of the nisi prius court, the finding will not be disturbed on appeal. Saxton v. Board of Education, 206 Cal. 758, 765, 769, 276 P. 998.

We have examined the record and are of the opinion there was substantial evidence considered in connection with such inferences as the trial court may have reasonably drawn therefrom to sustain the finding of fact set forth, supra, and each and every other material finding of fact upon which the judgment was necessarily predicated. We therefore refrain from further discussion of the evidence. Thatch v. Livingston, 13 Cal.App.(2d) 202, 56 P.(2d) 549; Koeberle v. Hotchkiss, 8 Cal.App.(2d) 634, 48 P.(2d) 104; Leavens v. Pinkham & McKevitt, 164 Cal. 242, 245, 128 P. 399.

The judgment is affirmed.

I concur: CRAIL, P. J.



21 Cal.App.2d 38

HY-LO UNIT & METAL PRODUCTS CO. v. RYON et al.

Civ. 10504.

District Court of Appeal, First District, Division 2, California.

May 14, 1937.

Rehearing Denied June 12, 1937.

Hearing Denied by Supreme Court July 12, 1937.

1. Fraudulent conveyances ⇐241(3)

Creditor, reducing claim to judgment against debtor corporation and endeavoring unsuccessfully to collect it by execution, *held* entitled to judgment setting aside transfers of debtor's personal property and judicial proceedings, including execution sale under another judgment against it, as made and taken with intent to delay and defraud such creditor, without alleging and proving specific lien, independent of judgment, on property transferred (Civ.Code, § 3439).

2. Fraudulent conveyances ⇐312(3)

Remedies of creditor, defrauded by transfer of debtor's property, are ordinarily limited to subjection thereof to satisfaction of creditor's claim (Civ.Code, § 3439).

3. Fraudulent conveyances ⇐314

Judgment creditor of corporation, which transferred its personal property to new corporation in exchange for stock acquired by controlling officers of both corporations through transfers and judicial proceedings intended to delay and defraud such creditor, *held* not entitled to money judgment against such officers and new corporation, in absence of allegation or proof that such property was not available for satisfaction of judgment (Civ.Code, § 3439).

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by the Hy-Lo Unit & Metal Products Company against Eppa H. Ryon and others. Judgment for plaintiff, and defendants appeal.

Reversed and remanded.

D. P. Hatch and W. C. Petchner, both of Los Angeles, for appellants.

Charles C. Montgomery, of Los Angeles, for respondent.

SPENCE, Justice.

Plaintiff brought this action seeking to set aside certain transfers of personal property and certain judicial proceedings, including an execution sale upon the ground that said transfers were made and that said proceedings were taken with the intent to delay and defraud plaintiff as a judgment creditor of defendant Standard Gas Company. The cause was tried by the court sitting without a jury and from a judgment in favor of plaintiff, defendants appeal.

There were three corporations involved in the transactions out of which this controversy arose, two of which corporations were named as defendants herein.

Standard Gas Valve Company, one of the defendants, was the original judgment debtor. It was a so-called family corporation in which all of the stock was owned by the Ryon family. Defendant Eppa H. Ryon was the president and a

director, and his son, defendant Tracy B. Ryon, was also a director thereof.

Remote Control Valve & Manufacturing Company, a corporation, is not a defendant in this action. It was a competitor of defendant Standard Gas Valve Company and in 1933 said corporations entered into an arrangement whereby a new corporation was to be organized and practically all of the assets of both of the existing corporations were to be transferred to the new corporation in exchange for stock of the new corporation.

Standard Remote Control Valve Company, one of the defendants herein, was the new corporation organized pursuant to said arrangement. Defendant Eppa H. Ryon was president and a director of this corporation, and his son, defendant Tracy B. Ryon, was a director thereof.

For the sake of clarity and brevity, we will refer to the above-mentioned corporations respectively as the debtor corporation, the second corporation, and the new corporation. The arrangement between the debtor corporation and the second corporation was that both corporations would offer their assets, including tangible assets and patent rights, to the new corporation in exchange for 420 shares of its stock. This offer was not to include the bills receivable or cash of the two old corporations, but these items were comparatively small in amount. The bills payable of the two old corporations were not to be assumed by the new corporation, but each of the two old corporations was to pay its own obligations. The assets of the debtor corporation were of a stated value of approximately $30,000 and those of the second corporation were of a stated value of approximately $22,000 for the purpose of the offer and transfer. It was agreed that these two corporations would divide the 420 shares of stock of the new corporation on the basis of 55 per cent., or 231 shares, to the debtor corporation and 45 per cent., or 189 shares, to the second corporation. The new corporation was organized, it accepted the offer above mentioned, and it obtained a permit from the corporation commissioner to issue 420 shares to the old corporations. Each of the old corporations published notice of intended sale and, at the time specified in the notice, bills of sale were delivered to the new corporation.

The foregoing transactions all occurred in 1933, during which time plaintiff had an action pending against the debtor corporation in the United States District Court. The master's final report was filed therein after the above-mentioned permit of the corporation commissioner had been issued. Said report found that approximately $3,000 and costs were due to plaintiff from the debtor corporation. Exceptions were filed to said report, said exceptions were subsequently overruled, and judgment for approximately $3,500 was entered in favor of plaintiff and against the debtor corporation on February 28, 1934. In the meantime the directors of the debtor corporation on January 22, 1934, passed a resolution directing the new corporation to divide up the 231 shares due to the debtor corporation as follows: 100 shares to defendant Eppa H. Ryon, 50 shares to defendant Tracy B. Ryon, and 81 shares to the debtor corporation. On the same day, this resolution was presented at a meeting of the board of directors of the new corporation. The last-mentioned board thereupon directed that application be made for an amended permit in order to permit the issuance of the certificates as requested by the debtor corporation. The amended permit was obtained on January 27, 1934. On February 9, 1934, the certificates were issued as requested. On February 15, 1934, defendant Eppa H. Ryon commenced an action against the debtor corporation upon alleged claims of himself and defendant Tracy B. Ryon for back salary due from the debtor corporation. In that action, the 81 shares standing in the name of the debtor corporation were attached, and thereafter the debtor corporation permitted its default to be entered. Defendant Eppa H. Ryon purchased said 81 shares of stock upon the execution sale.

It is apparent from what has been said that the result of these transactions was to strip the debtor corporation of its assets and to place all of the stock of the new corporation, for which the assets of the debtor corporation had been exchanged, into the hands of defendants Eppa H. Ryon and Tracy B. Ryon. It is further apparent that during all times mentioned the debtor corporation and the new corporation were controlled by said defendants Eppa H. Ryon and Tracy B. Ryon, and that these last-mentioned defendants, as officers of the debtor corporation, permitted the default of the debtor corporation to be taken in the action brought by Eppa H. Ryon upon the alleged salary claims of said officers.

After plaintiff had caused execution to be issued in his action against the debtor corporation, said execution was returned unsatisfied and plaintiff commenced this action.

The trial court found and concluded that the original transaction whereby the debtor corporation agreed to transfer its assets in exchange for the stock of the new corporation was not entered into with the intent to delay or defraud the creditors of the debtor corporation and was not void. The trial court further found, however, that all of the defendants entered into a conspiracy to make certain transfers and to cause certain judicial proceedings to be taken with the intent to delay and defraud plaintiff; that, pursuant to said conspiracy, defendants obtained an amended permit whereby the 150 of the 231 shares authorized to be issued to the debtor corporation were issued to defendants Eppa H. Ryon and Tracy B. Ryon; that said shares were the property of the debtor corporation and the transfer thereof as aforesaid was made for the purpose of concealing the ownership of said shares and with the intent to delay and defraud the creditors of the plaintiff corporation and particularly the plaintiff; that, pursuant to said conspiracy defendants planned a fraudulent judicial proceeding for the sole purpose of obstructing execution on plaintiff's judgment against the debtor corporation; that defendant Eppa H. Ryon, "acting in the dual capacity as president and general manager of the defendant in said action brought by himself as plaintiff in said superior court, suffered himself as plaintiff to take judgment by default against the corporation of which he was president and general manager"; that "all of said acts as above set out were done fraudulently and pursuant to a conspiracy among the defendants to defeat and defraud the just claims of the creditors of the Standard Gas Valve Company, including this plaintiff in particular, and were done with the intention, and the result of the acts was, to obstruct the execution by this plaintiff of its judgment rendered in the United States District Court as aforesaid"; and "that by reason of the premises, the just claims of plaintiff have been obstructed and rendered valueless, to its damage in the sum of $3544.84."

The judgment of the trial court was that the transfers of stock to defendants Eppa H. Ryon and Tracy B. Ryon were void; that the judicial proceedings brought by Eppa H. Ryon against the debtor corporation were void and particularly the execution sale in sale proceedings; and that plaintiff was entitled to judgment against all the defendants in the sum of $3,544.84.

[1] The main contentions of appellant on this appeal are that the amended complaint was insufficient to state a cause of action and that the evidence was insufficient to sustain a judgment in favor of respondent. We find no merit in these contentions. They are based largely upon the claim that respondent was "a judgment creditor without a lien," but this claim seems to be sufficiently answered in Rossen v. Villanueva, 175 Cal. 632, at page 634, 166 P. 1004, 1005, where the court said: "A creditor may attack a transfer as fraudulent when he has reduced his claim to judgment, and has endeavored without avail to collect the same by execution. [Citing cases.] This the plaintiff did here. He was not required to show that he had any specific lien, independent of the judgment, upon the property transferred by his debtor." Similarly, in Sewell v. Price, 164 Cal. 265, on page 270, 128 P. 407, 409, the court said, in speaking of such an action: "It is really an action for equitable relief against the obstruction caused by a transfer, which hinders him in satisfying his claim by the ordinary process of law; that is to say, by an execution. If, then, he has put himself in a position to levy execution, he has done everything necessary to enable him to attack the transfer which hinders his enjoyment of his right." We therefore believe that both the pleading and the proof were sufficient to show that respondent was entitled to equitable relief, for it is provided by statute in this state that "Every transfer of property * * * made, * * * and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor." Civ.Code, § 3439.

[2, 3] A different question is raised, however, by appellants' contention that the amended complaint was insufficient to state a cause of action for a money judgment and that the evidence was insufficient to support the money judgment entered. In other words, appellants contend that the "personal money judgment was improper and unwarranted by either law or facts." In our opinion, this contention must be sustained. In an action of this kind, the remedies of the creditor are ordinarily limited to subjecting the property of the debtor to the

satisfaction of the creditor's claim. 12 Cal.Jur. 1029, § 70. In the present case, the property of the debtor corporation which the respondent was entitled to have subjected to the satisfaction of its claim was the 231 shares of stock in the new corporation. The transfers and judicial proceedings by which this stock came into the names of appellants Eppa H. Ryon and Tracy B. Ryon were declared void by the trial court because made and taken with the intent to delay and defraud respondent as a creditor of the debtor corporation. Respondent was therefore entitled to have said property subjected to the satisfaction of his claim, but, in the absence of allegation or proof that said property was not available for that purpose, respondent was not entitled to a money judgment. Peter Barceloux Co. v. Buffum (C.C.A.) 61 F. (2d) 145, 153; Swinford v. Rogers, 23 Cal. 233, 234; 27 C.J. 855; Moore on Fraudulent Conveyances, vol. 2, p. 1023, § 8. There was neither allegation nor proof in the present case of any fact which would justify a money judgment against appellants under the rules stated in the foregoing authorities.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with the views expressed herein.

I concur: STURTEVANT, J.



PEOPLE v. DAVENPORT.*

Cr. 2976.

District Court of Appeal, Second District, Division 2, California.

May 20, 1937.

Rehearing Granted June 1, 1937.

1. Licenses ⇐42(3)

The counts of complaint charging that accused willfully, unlawfully, feloniously, and knowingly issued and sold and caused to be issued and sold to another for value an investment contract without a permit, was sufficient to charge a violation of Corporate Securities Act (Pen.Code, § 952; St. 1931, pp. 941, 950, §§ 3, 18; St.1933, p. 2309, § 2(a), subds. 3, 6–8).

2. Licenses ⇐42(3)

A count of complaint charging that accused, without a broker's license, willfully, unlawfully, and feloniously engaged in part in business of purchasing mutual building and loan association certificates issued by another with purpose of resale, was sufficient to charge a violation of Corporate Securities Act (Pen.Code, § 952; St.1933, p. 2309, § 2(a), subd. 10; p. 2315, § 6).

3. Constitutional law ⇐257

A constitutional amendment relating to arraignment before magistrate, requiring verified complaint, that accused be advised of right to counsel and actually represented, and that counsel of people consent to plea of guilty, did not deny due process to accused who pleaded guilty thereunder and was sentenced by superior court on certification of proceedings (Const.Cal. art. 1, § 8, as amended in 1934; Const.U.S. Amend. 14).

4. Constitutional law ⇐250

A constitutional amendment relating to arraignment, providing that accused shall be advised of right to counsel, and shall be given reasonable time or aid of peace officer to secure counsel, and that Legislature may prescribe further consistent procedure, affords equal protection of law to impecunious accused, especially in view of statute substantially embodying amendment and providing that statute does not authorize receiving plea of guilty from accused not represented by counsel (Pen.Code, § 859a, as added by St.1935, p. 493; Const.Cal. art. 1, § 8, as amended in 1934; Const.U.S. Amend. 14).

McCOMB, J., dissenting.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Noel Davenport was convicted of violating the Corporate Securities Act, and he appeals.

Affirmed.

Morris Lavine, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Walter L. Bowers, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and A. H. Van Cott, Deputy Dist. Atty., both of Los Angeles, for the People.

*Rehearing granted 69 P.(2d) 862.

WOOD, Justice.

The defendant appeals from judgments pronounced in the superior court after his pleas of guilty to ten counts of a complaint charging him with violations of the Corporate Securities Act (St.1917, p. 673, as amended). Defendant entered a plea of guilty in the municipal court of the city of Long Beach to each of the ten counts. That court thereupon certified the proceedings to the superior court, where the judgments were pronounced.

Defendant now contends that the various counts of the complaint do not state facts sufficient to constitute public offenses. The ten charges may be divided into two groups. Count XXIII, which may be taken as typical of one of the groups, is in the following words: "That on or about the 29th day of March, 1934, at and in the County of Los Angeles, State of California, the crime of violation Corporate Securities Act, a felony, was committed by Noel Davenport and Lyle H. Lee, who, at the time and place last aforesaid, did wilfully, unlawfully, feloniously and knowingly issue and sell, and cause to be issued and sold to Margaret Nelson, a security for value, to-wit, an investment contract entitled 'Agreement Noel Davenport and Margaret Nelson,' without having first secured a permit from the Commissioner of Corporations of the State of California so to do." Except as to dates and names the other four counts of this group are similar.

[1] The Corporate Securities Act provides in section 2 (a), subdivision 7, "The word 'security' shall include any * * * investment contract;" in subdivision 8, "'Sale' or 'sell' shall include every disposition, or attempt to dispose, of a security or interest in a security for value;" subdivision 3, "The word 'company' includes * * * individuals as hereinafter defined;" subdivision 6, "The word 'individual' in so far as it is included in the definition of a 'company,' includes only persons selling, offering for sale, negotiating for the sale of or taking subscriptions for any security of their own issue." (As amended by St.1933, p. 2309.) Section 3 of the act (as amended by St.1931, p. 941) provides: "No company shall sell * * * any security of its own issue until it shall have first applied for and secured from the commissioner a permit authorizing it so to do." As shown above the word "company" includes individuals. Section 18 of the act (as amended by St.1931, p. 950) prescribes the penalties for violations thereof. Section 952 of the Penal Code provides that the charge "may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused." The counts to which defendant entered pleas of guilty are in the language of the statute. All of the elements necessary to constitute public offenses are set forth therein. It will be noted that in the count above copied it is charged that defendant knowingly issued and sold an investment contract, setting forth dates and names and the fact that a permit had not been secured. In People v. Rubens, 11 Cal.App.(2d) 576, 54 P.(2d) 98, 1107, the indictment charged that defendant "did wilfully, unlawfully and knowingly authorize, direct and aid in the issue and sale of, and did issue, execute and sell, and cause, and assist in causing to be issued, executed and sold for value to" individuals named therein, "a security of their own issue, as defined in said Corporate Securities Act, to-wit: A certain certificate of interest in an oil and gas lease" on specifically described real property in Sacramento county, "without first having applied for and secured from the Commissioner of Corporations of the State of California a permit authorizing them so to do." It was held that the charge was sufficient to constitute a public offense as defined by the Corporate Securities Act.

Count XIV, which is typical of the other group, charges that defendant "did wilfully, unlawfully and feloniously engage in part in the business of purchasing a security issued by another, with the purpose of reselling such security, to-wit, the said Noel Davenport and Lyle H. Lee, purchased from Alexander Husband and Mabel C. Husband Mutual Building and Loan Association certificates Nos. 5456 and 5558 of the aggregate face value of $2443.00, with the purpose of reselling such certificates, the said defendants Noel Davenport and Lyle H. Lee not having first secured a broker's license from the Commissioner of Corporations of the State of California."

[2] It is provided in subdivision 10 of section 2 (a) of the Corporate Securities Act (as amended by St.1933, p. 2309) that, "The word 'broker' includes every person or company, other than an agent, who shall, in this State, engage either wholly

or in part in the business of selling, offering for sale, negotiating for the sale of, or otherwise dealing in any security issued by others * * * or of purchasing such securities with the purpose of reselling them, or of offering them for sale to the public;" and in section 6 (as amended by St.1933, p. 2315), "No person or company shall act as an agent or broker until such person or company shall have first applied for and secured from the commissioner a certificate, then in effect, authorizing such person or company so to do." This count also charges the offense in ordinary and concise language and in the language of the statute. It sufficiently sets forth facts constituting a public offense. People v. Ratliff, 131 Cal.App. 763, 22 P.(2d) 245; People v. Woolsey, 13 Cal.App.(2d) 54, 56 P.(2d) 557.

Defendant contends that the proceedings leading up to the point of judgment are in violation of the Fourteenth Amendment to the Constitution of the United States in that, as claimed, he has been deprived of his liberty without due process of law and that the proceedings deny to citizens the equal protection of the law.

In 1934 the People amended the Constitution of California and added to section 8 of article 1 the following: "When a defendant is charged with the commission of a felony, by a written complaint subscribed under oath and on file in a court within the county in which the felony is triable, he shall, without unnecessary delay, be taken before a magistrate of such court. The magistrate shall immediately deliver to him a copy of the complaint, inform him of his right to the aid of counsel, ask him if he desires the aid of counsel, and allow him a reasonable time to send for counsel; and the magistrate must, upon the request of the defendant, require a peace-officer to take a message to any counsel whom the defendant may name, in the city or township in which the court is situated. If the felony charged is not punishable with death, the magistrate shall immediately upon the appearance of counsel for the defendant read the complaint to the defendant and ask him whether he pleads guilty or not guilty to the offense charged therein; thereupon, or at any time thereafter while the charge remains pending before the magistrate and when his counsel is present, the defendant may, with the consent of the magistrate and the district attorney or other counsel for the people, plead guilty to the offense charged or to any other offense the commission of which is necessarily included in that with which he is charged, or to an attempt to commit the offense charged; and upon such plea of guilty, the magistrate shall immediately commit the defendant to the sheriff and certify the case, including a copy of all proceedings therein and such testimony as in his discretion he may require to be taken, to the superior court, and thereupon such proceedings shall be had as if such defendant had pleaded guilty in such court. The foregoing provisions of this section shall be self-executing. The Legislature may prescribe such procedure in cases herein provided for as is not inconsistent herewith. In cases not hereinabove provided for, such proceedings shall be had as are now or may be hereafter prescribed by law, not inconsistent herewith."

[3, 4] We find nothing in the amendment to the California Constitution which violates the Constitution of the United States. The procedure adopted provides a fair judicial hearing and applies to all citizens alike. It is provided that a written charge must be made in writing and under oath, that the accused must be advised of his right to counsel and actually represented by counsel who must be present at the time the defendant enters his plea of guilty, and that the magistrate and counsel for the People must consent to the plea. Defendant argues that persons financially unable to employ counsel are treated in a different manner from those who are able to employ counsel. The amendment to the California Constitution expressly provides that in cases not therein provided for "such proceedings shall be had as are now or may be hereafter prescribed by law not inconsistent herewith." In 1935 (St.1935, p. 493) the Legislature added to the Penal Code section 859a, which substantially embodies the constitutional amendment and contains the following: "The foregoing provisions of this section shall not be construed to authorize the receiving of a plea of guilty from any defendant not represented by counsel." Both in the constitutional amendment and the legislative enactment the rights of impecunious defendants have been preserved. All citizens have been accorded equal rights by the procedure adopted and under which the defendant with the advice of and in the presence of his counsel entered pleas of guilty. The defendant was not com-

pelled to submit to the procedure but voluntarily did so.

The judgments are affirmed.

I concur: CRAIL, P. J.

McCOMB, Justice (dissenting).[1]

I dissent. Defendant appeals from judgments and sentences pronounced by the superior court after his plea of guilty to ten counts of a complaint, charging him with violations of the Corporate Securities Act.

The essential facts are these:

Defendant entered a plea of guilty in the municipal court of the city of Long Beach to ten counts of a complaint, charging him with violations of the Corporate Securities Act. That court thereupon certified the proceedings to the superior court of Los Angeles county, in which court judgment and sentence on each count were pronounced.

A. Count XIII read as follows: "That on or about the 29th day of March, 1934, at and in the County of Los Angeles, State of California, the crime of Violation Corporate Securities Act, a felony, was committed by Noel Davenport and Lyle H. Lee, who, at the time and place aforesaid, did wilfully, unlawfully, feloniously and knowingly issue and sell, and cause to be sold to Margaret Nelson, a security for value, to-wit, an investment contract entitled 'Agreement Noel Davenport and Margaret Nelson' without having first secured a permit from the Commissioner of Corporations of the State of California so to do."

Except as to dates and names, counts XV, XVII, XIX, and XXI were identical.

B. Count XIV read as follows: "That the appellant 'did willfully, unlawfully and feloniously engage in part in the business of purchasing a security issued by another, with the purpose of reselling such security, to-wit, the said Noel Davenport and Lyle H. Lee purchased from Alexander Husband and Mabel C. Husband Mutual Building and Loan Association certificates Nos. 5456 and 5558, of the aggregate face value of $2443.00 with the purpose of selling such certificates, the said defendants, Noel Davenport and Lyle H. Lee, not having first secured a broker's license from the Commissioner of Corporations of the State of California.'"

Except as to dates and names, counts XVI, XVIII, XX, and XXII were identical.

Defendant relies for reversal of the judgments on the following proposition:

Each of the counts as to which he entered a plea of guilty failed to state a public offense.

This proposition is valid. As hereinabove set forth, the charges against defendant of violation of the Corporate Securities Act fell into two classes:

I. Count XIII is an example of the first class. This count, stripped of its surplus verbiage, simply charged defendant with having sold an interest in an investment contract without first having secured a permit from the commissioner of corporations of the state of California. The pleader's designation of the character of the contract is a mere conclusion, and, since there is no evidence before this court of the nature of the contract, we are unable to determine whether the investment contract was one falling within the provisions of the Corporate Securities Act or not. Therefore, since in the generic sense of the word, every contract is an investment contract, and it is perfectly lawful to sell, assign, or otherwise transfer or dispose of one's rights in or to any investment contract without first securing a permit from the commissioner of corporations of the State of California, unless it falls within the class described in the Corporate Securities Act, we must accord defendant the benefit of the presumption, which is one of the inalienable rights of every citizen of the State of California, to wit, that of innocence of crime until the contrary is proven beyond a reasonable doubt (section 1096, Pen.Code; section 1963, subdivision 1, Code Civ.Proc.); and assume that the contract described in this count was one, the rights of which could lawfully be sold without the seller first obtaining a permit from the commissioner of corporations. It is therefore apparent that neither count XIII, XV, XVII, XIX, nor XXI stated a public offense.

II. Count XIV is an example of the second class. Stripped of its surplus verbiage, it simply charges defendant with having purchased a security for the purpose of reselling it without having first secured a broker's license from the commissioner of corporations of the state of California. We find nothing in the Corporate Securities Act which requires an individual to secure a broker's license before selling securities which he has purchased and owns himself. Indeed, were the act to so pro-

[1] Opinion adopted on rehearing as the opinion of the court 69 P.(2d) 862.

vide, it would be unconstitutional as depriving a citizen of the state of an inalienable right of which he may be legally deprived only by the sovereign people of the State of California, to whose will the legislative, executive and judicial departments alike must bow. The sovereign people of the State of California in the most solemn manner known to the civilized world have guaranteed to each citizen the right of acquiring and possessing property which includes the right to dispose of such property in such innocent manner as he pleases and to sell it for such price as he can obtain. Article 1, § 1, Const. of Cal.

The foregoing principles have been repeatedly announced and enforced by the Supreme and Appellate Courts of this state. In Billings v. Hall, 7 Cal. 1, 6, Mr. Chief Justice Murray, speaking for our Supreme Court, says:

"Section first of Article I of the Constitution of California, declares that 'all men are by nature free and independent, and have certain inalienable rights, amongst which are those of enjoying and defending life and liberty, acquiring possession, protecting property, and pursuing and obtaining safety and happiness.' This principle is as old as the Magna Charta. It lies at the foundation of every constitutional government, and is necessary to the existence of civil liberty and free institutions. It was not lightly incorporated into the Constitution of this State as one of those political dogmas designed to tickle the popular ear, and conveying no substantial meaning or idea; but as one of those fundamental principles of enlightened government, without a rigorous observance of which there could be neither liberty nor safety to the citizen.

"If, then, one of the primary objects of government is to enable the citizen to acquire, possess, and defend property, and this right has been guarantied by the Constitution, how can it be impaired by legislation?"

In Roystone Co. v. Darling, 171 Cal. 526, 531, 154 P. 15, Mr. Justice Shaw says: "* * * that section 1 of article 1, declaring that all men possess 'certain inalienable rights,' among them the right of 'acquiring, possessing, and protecting property,' is a guaranty which includes the right to contract concerning the use, enjoyment, and disposition of property, and which cannot be taken away or restricted by the Legislature except by reasonable regulations made in the exercise of the police power."

In Ex parte Quarg, 149 Cal. 79, 80, 84 P. 766, 5 L.R.A.(N.S.) 183, 117 Am.St.Rep. 115, 9 Ann.Cas. 747, Mr. Justice Shaw says: "The constitutional guaranty securing to every person the right of 'acquiring, possessing and protecting property,' refers to the right to acquire and possess the absolute and unqualified title to every species of property recognized by law, with all the rights incidental thereto, and, in connection with the right of personal liberty, it includes the right to dispose of such property in such innocent manner as he pleases, and to sell it for such price as he can obtain in fair barter. * * * These rights are in fact inherent in every natural person, and do not depend on constitutional grant or guaranty. Under our form of government by Constitutions the individual, in becoming a member of organized society, unless the Constitution states otherwise, surrenders only so much of these personal rights as may be considered essential to the just and reasonable exercise of the police power in furtherance of the objects for which it exists. Cooley on Stat. Lim., pp. 68, 244; 1 Barb. on Rights, pp. 122, 284."

Again in People v. Pace, 73 Cal.App. 548, 561, 238 P. 1089, 1095, Mr. Justice Hahn, after quoting with approval from Ex parte Quarg, supra, says:

"The principle enunciated by Mr. Justice Shaw has been declared in frequent decisions, and needs no additional citations. However, it is urged that the opinion in Ex parte Quarg is not in point, because the sale of theater tickets does not involve the 'general welfare.' It must be conceded that the ownership of a theater ticket finds its basis in the same personal right that the ownership of a bond or any other security finds its law; and if the owner of a theater ticket may sell it unhampered by legislative regulation or prohibition, we are unable to ascertain upon what theory the owner of a bond or other security may not exercise the same untrammeled right.

"The Attorney General concedes that it would invade the constitutional rights of a citizen if he were prohibited from selling his securities, which he would have the legal right to buy and possess, but contends that the law under consideration is simply a regulation, and in support of this argument cites certain cases which have sustained laws which were merely regulatory

in their requirements. If the act under consideration were confined simply to a requirement that all owners of certain types of securities, before selling them, should file with some official certain information, and thereupon they would have the right to dispose of their property without any other burden or interference, the position of the Attorney General might be maintained. But this is not the situation that confronts us. The act in part provides for regulation, but also provides a power to refuse a permit, which would make absolute prohibition in the sale of one's securities. The only purpose of the act in requiring the filing of certain information in the form of a petition by a person desiring to sell securities is to lay the foundation for action by the corporation commissioner that may or may not, according to his finding, result in an absolute prohibition of the sale of his securities.

"In these days when the urge is strong upon legislative bodies to extend the paternal arm of government into the realm of economic activities, it is particularly important that courts in the exercise of the particular functions imposed upon them by the Constitution, shall scrutinize with care legislation which tends to encroach upon the constitutional guaranties, to the end that the right of the individual to liberty and possession of property shall become, not a mere theory, but shall be maintained as a practical reality. And while it is true that the increasing conflict between the rights of the individual and the general welfare of society presents ofttimes difficult and perplexing problems, nevertheless courts should not and will not permit the violation of those most fundamental rights that underlie our very existence as a nation."

The decision last cited was written in 1925. Since that time it is a matter of common knowledge that legislative bodies have not only been urged to extend but have "extended the paternal arm of government into the realm of economic activities" to an extent which in 1925 would have seemed totally impossible.

It is therefore evident that it behooves the courts to scan with ever-increasing vigilance and care legislation which may have the slightest tendency to encroach upon the constitutional guarantees of our citizens and ever to bear in mind our Supreme Court's pronouncement in Ex parte Quarg, supra, to the effect that the constitutional guarantee securing to every person the right of acquiring, possessing, and protecting property refers to the right to possess absolutely and unqualifiedly every species of property recognized by law with all rights incidental thereto, including the right to dispose of such property in such innocent manner as he pleases, and that these rights are guaranteed to citizens of the State of California by our State Constitution.

In my opinion, for the foregoing reasons, the judgments should be reversed.



FENNESSEY et al. v. PACIFIC GAS & ELECTRIC CO. et al. *

Civ. 10257.

District Court of Appeal, First District. Division 1, California.

May 22, 1937.

Rehearing Denied June 21, 1937.

Hearing Granted by Supreme Court July 19, 1937.

1. Trial ⇐328

Where jury brought in verdict against defendant motorist but failed to bring in verdict for or against defendant corporation and its employee, result as between plaintiff and corporation and its employee was a mistrial, where corporation and employee had not joined in answer with motorist.

2. Appeal and error ⇐106

An order, which in effect declared mistrial as to two defendants for failure of jury to return a verdict for or against them, and which discharged jury, is not an appealable order, and cause may, under statute, again be tried (Code Civ.Proc. § 616).

3. Appeal and error ⇐930(1)

The failure of plaintiff to ask for a correction of a verdict, which failed to find on issues as to two of three defendants, did not raise presumption that those issues were abandoned.

4. Trial ⇐322

Where written verdict of jury failed to find for or against two defendants, there was no verdict between plaintiff and those defendants, though several jurors in answer to court's inquiries orally replied that they intended to bring no verdict against the

*For subsequent opinion see 76 P.2d 104.

two defendants, since under statute verdict must be in writing (Code Civ.Proc. § 618, as amended by St.1935, p. 1956).

5. Trial ⇐340(3)

Where jury failed to find for or against two of three defendants, court was without authority to enter judgment for such defendants, though evidence may have been insufficient to support judgment against them (Code Civ.Proc. § 629).

6. Appeal and error ⇐105

A refusal to grant motion for nonsuit at conclusion of all the evidence is not appealable, though it may have been competent for court to have granted such motion (Code Civ.Proc. § 963, as amended by St. 1933, p. 2472).

7. New trial ⇐3

Where no verdict was returned for or against two of three defendants, there was nothing to be reviewed by a new trial.

8. Appeal and error ⇐110

An order granting a new trial, though jury returned no verdict for or against two defendants, is appealable under statute, where jury trial was a matter of right (Code Civ.Proc. § 963, as amended by St. 1933, p. 2472).

9. New trial ⇐3

A motion for new trial did not lie, when jury failed to return verdict for or against defendants, and order granting motion was erroneous.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by Irene Fennessey and William J. Fennessey against the Pacific Gas & Electric Company, Thomas Foley, and another. From an order directing a retrial of the issues as between the plaintiff and the main defendant and from an order granting a new trial of those issues and denying the named defendants' motion for an order directing the clerk of the court to enter judgment for them, the named defendants appeal.

Appeals dismissed, and order granting new trial reversed.

Thomas J. Straub, W. H. Spaulding, and Clinton F. Stanley, all of San Francisco, for appellants.

John J. Taaffe, George B. Harris, and P. J. Murphy, all of San Francisco, for respondents.

PER CURIAM.

Appeal by defendants Pacific Gas & Electric Company, a corporation, and Thomas Foley from an order directing a retrial of the issues in the above action as between plaintiff and said appellants, and also from orders granting plaintiff a new trial of those issues and denying appellants' motion for an order directing the clerk of the court to enter judgment for appellants. The latter motion was made upon the ground that the jury had returned a verdict in appellants' favor.

The action grew out of injuries suffered by plaintiff Irene Fennessey, who was struck by an automobile driven by defendant Manecis. Plaintiff alleged that her injuries were proximately caused by the concurrent negligence of Manecis and appellants.

At the conclusion of plaintiff's case appellants moved for a judgment of nonsuit; and when the taking of testimony closed they also moved for an order, not in the alternative form, directing a verdict in their favor, both of which motions were denied. The jury was then instructed that it might return a verdict against or in favor of all the defendants or against defendant Manecis alone, but that if they found against Foley, who was an employee of the defendant corporation, they must also find against his employer. Three forms of verdict in accordance with the instructions were then submitted to the jury.

The jury having announced that it had reached a verdict, the following proceedings were had:

"The Court: Have you reached a verdict?

"The Foreman: Yes sir (handing verdict to the court).

"The Court (reading:) 'Irene Fennessey, Plaintiff, v. Pacific Gas and Electric Company and Others, Defendants. Verdict. We, the jury in the above entitled cause, find a verdict in favor of plaintiffs, Irene Fennessey and William J. Fennessey, and against defendant George L. Manecis, and assess damages in the sum of fifteen thousand dollars. Donald T. Stockman, Foreman.' Is this the verdict of at least nine of your number?

"The Foreman: Yes.

"The Court: Record the verdict, Mr. Clerk, and then read it back to the jury.

"The Clerk: This is your verdict as it has been recorded (reading).

"Mr. Murphy: May we have the jury polled, your Honor?

"(The clerk thereupon polled the jury and announced that the verdict as rendered was the unanimous verdict of the jury.)

"The Court: Now, ladies and gentlemen of the jury, I did not give you a verdict in favor of the defendants—certain defendants. Do I understand correctly that by this form of verdict you intended to bring in no verdict against either Foley or the P. G. & E.?

"A Juror: That is right.

"The Court: Is that correct?

"A Juror: That is correct.

"The Court: Well, then, the jury will be excused until further notice from the presiding judge."

A judgment, which followed the verdict, was entered; no reference to appellants being made in either. Following this the motions and orders mentioned were made.

[1, 2] It appears to be well settled that a verdict in the form returned where, as here, the appellants had not joined in an answer with Manecis, was a failure to find on the issues raised by their pleading; and, other things being equal, the result as between them and the plaintiff was a mistrial. Rankin v. Central Pacific R. Co., 73 Cal. 93, 15 P. 57; Benson v. Southern Pacific Co., 177 Cal. 777, 171 P. 948; McMahon v. Hetchhetchy, etc., Ry. Co., 2 Cal.App. 400, 84 P. 350. An order in effect so declaring and discharging the jury is not an order from which an appeal may be taken (Mullin v. Rouseau, 112 Cal.App. 719, 297 P. 944), and in such cases the cause may again be tried. Code Civ.Proc. § 616.

[3] Nor did plaintiff's failure to ask for a correction of the verdict at the time it was announced raise a presumption that those issues had been abandoned. Rankin v. Central Pacific R. Co., supra.

Appellants contend, however, that the jury intended a verdict in their favor, and that this appears from the proceedings quoted above.

In Crain v. Sumida, 59 Cal.App. 590, 211 P. 479, 480, a jury expressly found that plaintiff should recover against one of two defendants (naming him), and in conclusion declared that they found "* * * in favor of the defendant ——— that plaintiff take nothing." It was held that the verdict when considered in connection with the instructions was sufficiently certain and that an intention to find in favor of the other defendant clearly appeared. But the facts in Keller v. Smith, 130 Cal.App. 128, 19 P. (2d) 541, are similar to those in the case at bar; and it was there held that the intention of the jury in rendering a verdict must not be left to inference or presumption, but must be specifically declared; and where not so declared in reference to one of the several defendants who had separately answered, it must be taken that the jury had failed to answer upon that particular issue.

But appellants claim that the assent by two of the jurors in response to the inquiry by the trial court as to whether they intended no verdict against appellants, made the fact certain, and that the verdict returned was in effect one in their favor.

[4, 5] A verdict must be in writing (Code Civ.Proc. § 618 [as amended by St. 1935, p. 1956]), and, so far as we are advised, it has never been held in this jurisdiction that matters with respect to which a verdict is silent can be supplied by the oral declarations of jurors as to their intention. We feel bound to hold that as between the plaintiff and appellants the jury failed in legal effect to find upon material issues. This being true, there was as between these parties no verdict; and, as held in Vitimin Milling Corporation v. Superior Court, 1 Cal.(2d) 116, 33 P.(2d) 1016, the trial court would have been without authority under section 629 of the Code of Civil Procedure to enter a judgment in favor of appellants though it should appear that the evidence was insufficient to support a judgment against them.

[6] Assuming that it would have been competent for the court to have granted a motion for a nonsuit at the conclusion of all the evidence (9 Cal.Jur., Dismissal, etc., § 38, p. 56), a refusal would not have been appealable (Code Civ.Proc. 963; Dahl v. Spotts, 128 Cal.App. 133, 16 P.(2d) 774).

[7, 8] The foregoing applies equally to the motion for a new trial. There being no verdict, the trial was not complete, and there was consequently nothing to be reviewed by a new trial. 20 Cal.Jur., New Trial, § 8, p. 19; Vitimin Milling Corp. v. Superior Court, supra. This order, however, being made in a case where a trial by jury was a matter of right, was, of course, appealable. Code Civ.Proc. § 963 (as amended by St.1933, p. 2472).

[9] We are satisfied that as between plaintiff and appellants, no verdict having been returned, the order denying appellants' motion and the order directing a retrial of

the action as between these parties, were not appealable, and that the attempted appeals therefrom should be dismissed; further, that there being no verdict, the motion for a new trial did not lie, and the order granting the same was erroneous. Benjamin v. Stewart, 61 Cal. 605.

It is therefore ordered that the appeals mentioned be and they are dismissed, and the order granting a new trial is reversed.



21 Cal.App.2d 64

BOARD OF EDUCATION OF CITY OF EUREKA et al. v. JEWETT.

Civ. 5726.

District Court of Appeal, Third District, California.

May 17, 1937.

Hearing Denied by Supreme Court July 15, 1937.

1. Schools and school districts ⇐141(5)

Where there is not an entire absence of notice of proceeding to dismiss teacher for violation of School Code, trial court's determination as to whether notice substantially complies with Code is controlling if court does not abuse its discretion (School Code, § 5.651, as added by St.1931, p. 1395; § 5.653, as amended by St.1933, p. 1018).

2. Schools and school districts ⇐141(5)

In proceeding to dismiss teacher for seditious utterances and other violations of School Code, where teacher received formal notice only of attempted dismissal, accompanied by copies of complaint and of School Law, and demanded hearing, finding was discretionary that notice substantially complied with code requiring notice of right to demand hearing (School Code, § 5.653, as amended by St.1933, p. 1018).

3. Schools and school districts ⇐141(5)

In proceeding to dismiss teacher for violations of School Code, teacher's participation in hearing in trial court waived defect in notice of right to demand hearing (School Code, § 5.653, as amended by St. 1933, p. 1018).

4. Schools and school districts ⇐141(5)

Under School Code requiring merely that complaint to dismiss teacher be affirmed under oath, verification under Code of Civil Procedure on information and belief is sufficient (Code Civ.Proc. § 446, as amended by St.1933, p. 1850; School Code, § 5.651, as added by St.1931, p. 1395; § 5.653, as amended by St.1933, p. 1018).

5. Schools and school districts ⇐141(4)

The violation of teacher's oath of patriotism and allegiance prescribed by School Code justifies revocation of his credentials and constitutes "unprofessional conduct," within meaning of provisions of Code governing dismissals (School Code, § 5.128, as added by St.1931, p. 690; § 5.650, as amended by St.1933, p. 1017).

[Ed. Note.—For other definitions of "Unprofessional Conduct," see Words & Phrases.]

6. Schools and school districts ⇐141(5)

Evidence of classroom statements of junior high school teacher, which, among other things, ridiculed American flag, disparaged government, decried religion, and advocated belief in communism, and evidence that books furnished did not justify such statements, showed violation of statutory oath of patriotism and allegiance, and, with evidence of similar conduct outside classroom, authorized dismissal of teacher for "unprofessional conduct" under School Code (School Code, § 5.128, as added by St.1931, p. 690; § 5.650, as amended by St.1933, p. 1017).

7. Schools and school districts ⇐141(5)

In proceeding to dismiss teacher for violations of School Code, cross-complaint was properly stricken, since Code provides no affirmative relief to teacher except restoration and payment of salary, which would follow judgment in teacher's favor under complaint and answer (School Code, § 5.654, as amended by St.1935, p. 1887).

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Proceeding by the Board of Education of the City of Eureka, B. M. Marshall and others, as directors of such board, against Victor R. Jewett, wherein defendant filed a cross-complaint, which was stricken. From a judgment for plaintiffs, defendant appeals.

Affirmed.

Clarence E. Rust, of Oakland, for appellant.

Delos A. Mace, Dist. Atty., and A. G. Bradford, Deputy Dist. Atty., both of Eureka, for respondents.

HELD, Justice pro tem., delivered the opinion of the court.

Appellant was a teacher of "Social Studies" under the jurisdiction of respondent Board of Education, in the Eureka Junior High School in the City of Eureka, in this state, and held a permanent classification rating. On August 14, 1935, one Frank Miller filed with respondent board a document charging appellant with unprofessional conduct, evident unfitness for service, and making seditious utterances. On August 15, 1935, respondent served upon appellant a notice that at a meeting of the Board of Education held on the previous day a verified petition had been filed charging appellant with unprofessional conduct, and that on motion he had been dismissed as a teacher in the school. A copy of the "School Law and Complaint" accompanied service of the notice. Thereafter, and within thirty days, appellant served upon respondent "specifications and demand," and within the same period, "amended specifications and demand." In each, the appellant denied the jurisdiction of the board to make the order of dismissal, and demanded its immediate revocation. The amended document denied also the jurisdiction of the board to hold a hearing. Each document reserved all rights of appellant growing out of the alleged want of jurisdiction, and subject to such reservation, demanded a hearing upon the charges filed with the board. On September 26, 1935, the complaint was filed in this action, wherein plaintiff asks that the court inquire into the charges against defendant and appellant, and determine whether the same are true, and, if so, whether they constitute sufficient grounds for dismissal. Following an extended hearing by the court, appellant was found by the court, guilty of unprofessional conduct, and judgment was entered authorizing respondent board to dismiss him from his position as a teacher in the junior high school in the city of Eureka. From that judgment, this appeal is prosecuted.

This proceeding was instituted in the superior court pursuant to section 5.654 of the School Code (as added by St. 1931, p. 1396), as amended in 1935 (Stats. 1935, p. 1887). In that section it is provided that when a teacher, who has been served with notice of intention of the governing board to dismiss him, demands a hearing, the board may either rescind its action, or file a complaint in the superior court praying an inquiry into the truth of the charges, and to determine whether the same, if sustained, constitutes sufficient grounds for dismissal. Prior to the amendment of 1935 of section 5.654, the hearing, if one was demanded, was to be had before the governing board. Other provisions of the School Code dealing with the dismissal of teachers were amended in 1935, and all such amendments became effective on September 15, 1935. The proceedings leading up to the present action and culminating in a demand for a hearing were had prior to September 15, 1935, and the procedure prescribed by the former statute was adopted. The complaint herein was filed on September 26, 1935, and the hearing which followed was in accordance with section 5.654 as amended in 1935.

Certain sections of the School Code applicable here, as they existed prior to the amendments of 1935, and at the time of such of the proceedings herein as were had prior to September 15, 1935, may be noted. Section 5.650 (Stats.1933, p. 1017) set forth the grounds on which a permanent teacher might be dismissed. These included, among others, unprofessional conduct, seditious utterances, and evident unfitness for service. Section 5.651, Stats.1931, p. 1935) prescribed the procedure immediately following the filing of charges, where the basis thereof is other than immoral conduct, and section 5.653 (Stats.1933, p. 1018), where the charge was based on immoral conduct, criminal syndicalism, seditious utterances, or membership in a society advocating criminal syndicalism. Section 5.-651, not having been amended in 1933, the provisions of section 5.653 govern where seditious utterances, criminal syndicalism and membership in a society advocating criminal syndicalism, are charged.

The charges against appellant filed with respondent board alleged unprofessional conduct, evident unfitness for service, and seditious utterances. As to seditious utterances, the procedure to be followed was that prescribed by section 5.653 as amended in 1933, and as to the charges of unprofessional conduct and evident unfitness for service, section 5.651, as enacted in 1931, governed. Where seditious utterances were charged, the board was required to suspend the teacher immediately and give him notice thereof, and that unless within thirty days he demanded a hearing, he would be dismissed. On the other hand, where the charges were unprofessional conduct and evident unfitness for service, the power of

the governing board authorizes the giving of a notice to a teacher that he will be dismissed at the end of the then current school year unless a hearing be demanded.

[1] Inasmuch as seditious utterances were included in the charges filed against appellant, it became the duty of respondent board to suspend appellant immediately, and to notify him of his right to a hearing. The notice given, however, was that appellant was dismissed. The board had power only to suspend. Accompanying the notice was a copy of the complaint filed with the board and a copy of the School Law. He was thus fully apprised of the extent of the power of the board and of his right to a hearing. That this was so is indicated by the fact that he did demand a hearing. No prejudice is shown to have resulted to appellant, notwithstanding the defect in the form of the notice. He was accorded a hearing as fully and completely as though the notice had been technically correct. This is not a case where there was an entire absence of notice; there was merely a defect, and it was within the province of the trial court to determine whether there was a substantial compliance with the statute. As was said in Beck v. Ransome-Crummey Co., 42 Cal.App. 674, 184 P. 431, 434: "If * * * there is not an entire omission of a statutory requirement, but merely a defect, a court may properly determine there has or has not been a substantial compliance with the statute dependent upon the facts of the particular case. * * * This judgment of what is a substantial compliance with the statute is to be exercised in the first instance by the trial court. If the case is one where a requirement of the statute has not been entirely disregarded, its determination of the question of substantial compliance ought to be controlling in the absence of an abuse of discretion."

[2,3] The trial court having found herein that the notice served on appellant was a substantial compliance with the statute, and no abuse of discretion appearing, the decision of the trial court on the question must control. Furthermore, appellant having participated in the hearing in the lower court, waived any defect in the notice. Haverstick v. Southern Pac. Co., 1 Cal.App.(2d) 605, 37 P.(2d) 146.

[4] It is contended also by appellant that the trial court was without jurisdiction for want of sufficient charges filed with the respondent board. The alleged insufficiency is claimed to arise out of the fact that the charges are made on information and belief, and the affidavit verifying the same was made in accordance with section 446, Code of Civil Procedure (as amended by St.1933, p. 1850). It is contended that sections 5.651 and 5.653, which provide for written charges, duly signed and verified, "require that the statements be made within the personal knowledge of affiant." But those sections do not so provide. It has been held that charges filed under the State Civil Service Act (Deering's Gen.Laws, Act 1400) are sufficient if made on information and belief. Vadnais v. Department of Motor Vehicles, 3 Cal.App.(2d) 562, 40 P.(2d) 559. There is no reason apparent why that should not be the case here. The provision for a verification requires merely that what has been properly alleged be affirmed under oath. McCaffey, etc., Co. Inc., v. Bank of America, 109 Cal.App. 415, 294 P. 45.

We conclude that the trial court was vested with jurisdiction to inquire into the charges made against appellant, to determine whether the same were true, and if true, whether they constituted sufficient grounds for dismissal of appellant.

[5] The appellant was a teacher in the junior high school. Children who had completed the work of the sixth grade are eligible to enter that school. School Code, § 3.250 (as amended by St.1931, p. 2320). The pupils receiving instruction from appellant would therefore range in age from twelve years upward. That the children coming under the supervision and influence of a teacher in the junior high school are of an impressionable age must be conceded. To obtain his credentials appellant subscribed to an oath to support the Constitution and laws of the United States and of the state of California, and by precept and example to promote respect for the flag, and undivided allegiance to the government of the United States. School Code, § 5.128 (as added by St.1931, p. 690). Violation of the oath justifies a revocation of his credentials by the State Board of Education, and would, to say the least, constitute unprofessional conduct. In Goldsmith v. Board of Education, 66 Cal.App. 157, 225 P. 783, it was held that solicitation by a teacher of support for a candidate for the office of county superintendent of schools constituted unprofessional conduct.

The statement of appellant to one of his pupils that it was silly and foolish to salute the American flag is certainly not calculated to promote respect for our national emblem. His admission to the witness Jacobs that he had told his pupils that "Russia had the best government in the world, and that we had one of the worst," leads one to question appellant's fitness to instruct children of tender years. The same witness stated that appellant had said to him that Russia "always pays its debts, it is this country that doesn't pay its debts"; that the United States was "the aggressor in every war we have been in"; that "we were a bully amongst nations and took advantage of all the smaller nations." Appellant disapproved the attendance of his pupils at the cinema to view a patriotic moving picture; he distributed to his pupils, in the classroom, pamphlets commenting on communism, and also circulated pamphlets concerning the case of Thomas J. Mooney, whom he described as a greater martyr than Abraham Lincoln; he told his pupils that he would rather be a "live coward than go to war." On another occasion he stated that if the United States became involved in war he "would have nothing to do with it"; that the United States needed neither army or navy. To some of his pupils, he spoke disparagingly of Abraham Lincoln. To others he decried religion. When accused by one pupil of being a communist, and by another of belonging to a communist club, he made no denial. Other teachers in the school testified that pupils coming from the class room of appellant, to theirs, were mentally disturbed by his teaching. That appellant was in correspondence with the office of the "Western Worker," a communist publication, is conceded by him, as well as that he was a subscriber to, and supporter of that publication. The appellant testified as a witness on his own behalf, but much of his testimony was evasive, particularly his explanation of the purpose of the payment to him in 1934, of certain moneys by direction of the State Bank of the U. S. S. R. in Moscow. Nor did he satisfactorily explain his visit with a woman representing herself to be an emissary of the Russian government.

[6] From the foregoing recital of acts and conduct of appellant, his unfitness to be the teacher of children of impressionable age sufficiently appears without further statement of other similar acts and conduct on his part which are disclosed by the evidence. Waiving all other circumstances, his demeanor in the class room was in violation of the oath assumed by him to obtain his credentials entitling him to teach.

In Allied Architects' Association v. Payne, 192 Cal. 431, 221 P. 209, 210, the court said: "It is settled beyond question that the promotion of patriotism, involving as it does the sense of self-preservation, is not only a public purpose but the most elemental of public purposes. * * * The continuity of our governmental institutions is dependent in a large measure upon the perpetuation of a patriotic impulse which is but the willingness to sacrifice all for the ideas and the ideals which form the foundation stones of our republic." By section 5.544 of the School Code, the people of California, speaking through the legislature, make it the duty of all teachers to endeavor to impress upon the minds of the pupils the principles of patriotism, and to train them up to a true comprehension of the duties and dignity of American citizenship. Throughout the School Code is manifest an intent on the part of the people of California to instill in school children a respect and reverence for our institutions. This purpose cannot be accomplished by acts and conduct such as those manifested by appellant. The liberality of our institutions is such as to permit a teacher in our schools to teach the nature of other forms of government, but there is a wide distinction between teaching and advocating.

The preservation of our nation depends on the patriotism of its people. Our School Code gives recognition to the principle that patriotism is to be instilled in the pupils attending our public schools. This purpose is not accomplished by the retention on our teaching staffs of instructors who entertain the beliefs held by appellant, and who seek to impress those beliefs upon their pupils. Appellant's offense is not his attitude toward our institutions, but rather his persistent efforts to enlist support for his anti-American views from his pupils.

Appellant seeks to justify his statements, acts, and conduct in the classroom by the contention that the same were in accord with certain text books furnished him by the school authorities as guides for instruction of his pupils. While it may be conceded that the respondent board may, on a further examination of those textbooks, believe itself warranted in discontinuing their use, nevertheless, the misbe-

havior of appellant exceeded anything that might reasonably be held justified by those guides.

[7] The order striking the cross-complaint was proper. Section 5.654 of the School Code limits the extent of a proceeding such as the present one, to a determination whether the charges are true, and, if so found, whether they justify dismissal. No affirmative relief to appellant is provided for, except restoration and payment of salary, and that would follow a judgment in his favor on the issues framed by the complaint and answer.

Whether suspension of the appellant by the respondent board pending the hearing of charges, was authorized, in view of the finding of the trial court that appellant was guilty only of unprofessional conduct, is not involved here. Nor is it necessary to decide whether, for the offense of which he was found guilty, the appellant might have been dismissed prior to the end of the then current school year on June 30, 1936. Those questions can only arise in a case where appellant might seek recovery of salary for the time between the suspension and the end of the school year.

The judgment is affirmed.

We concur: THOMPSON, Acting P. J., PLUMMER, J.



21 Cal.App.2d 121

LUCERNE COUNTRY CLUB v. BEAL et al.

Civ. 5722.

District Court of Appeal, Third District, California.

May 21, 1937.

Rehearing Denied June 21, 1937.

1. Appeal and error ⇐1046(5)

A remark of court during trial as to doubt of sufficiency of defendant's answer furnishes no basis for either supporting or setting aside subsequent order granting defendant a new trial.

2. Appeal and error ⇐933(1)

On appeal from order granting new trial, presumption is in favor of order, and against verdict.

3. Appeal and error ⇐854(6)

An order granting a new trial will be affirmed if it may be sustained on any ground.

4. Appeal and error ⇐901

A party appealing from order granting new trial has burden to show error.

5. Appeal and error ⇐854(6)

Where motion for new trial is granted in general terms, if any of the grounds set forth in motion are sufficient to sustain order, it will not be disturbed on appeal, except when new trial is granted on grounds of insufficiency of evidence to sustain verdict.

6. Appeal and error ⇐933(4)

Provision of statute that where new trial is granted on part of the issues, on ground of insufficiency of evidence to sustain verdict, order shall so specify, need not be followed in its exact language, in order that appellate court may look into testimony to determine whether order should or should not be upheld (Code Civ.Proc. § 657, subd. 7).

7. Appeal and error ⇐933(4)

An order decreeing that a new trial be granted defendant as to all issues made by his cross-complaint and the answer thereto sufficiently complied with requirements of statute that where new trial is granted on ground of insufficiency of evidence to sustain verdict, order shall so specify, so as to entitle appellate court to look into testimony to determine whether order should be upheld (Code Civ.Proc. § 657, subd. 7).

Appeal from Superior Court, Lake County; Benjamin C. Jones, Judge.

Action by the Lucerne Country Club against R. J. Palmer and others, wherein the defendants filed counterclaims and cross-complaints. From an order granting the named defendant a new trial, the plaintiff appeals.

Affirmed.

Lovett K. Fraser, of Lakeport, for appellant.

Charles N. Douglas, of San Francisco, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff by this action sought to recover from the defendants the sum of

$3,329.38. The defendants in their answers denied any indebtedness to the plaintiff. In addition to filing answers denying the allegations of the plaintiff's complaint, the respective defendants filed counterclaims and cross-complaints. Save and except as to the defendant R. J. Palmer, the judgments entered in this action are not involved upon this appeal.

In addition to his answer denying the allegations of the plaintiff's complaint, the defendant R. J. Palmer filed a counterclaim and cross-complaint. In both the counterclaim and the cross-complaint the defendant R. J. Palmer set up an alleged contract of employment by the Lucerne Country Club, in which it was alleged that the plaintiff had become indebted, and was indebted to the defendant Palmer in the sum of $4,985.19. The original amount was somewhat in excess thereof, but upon which indebtedness the cross-complaint admitted a payment of $229.31.

The judgment entered by the court was to the effect that Palmer was indebted to the plaintiff in the sum of $229.31. The court further found that the plaintiff was not indebted to Palmer in any sum whatever. In its findings that the plaintiff was not indebted to Palmer, no direct mention is made of the cross-complaint filed by the defendant Palmer. The conclusions of law are likewise in the language of the findings so far as the defendant Palmer is concerned, and read as follows:

"The court finds that defendant R. J. Palmer is not entitled to recover any judgment against plaintiff."

The judgment entered makes no reference whatever to the cross-complaint filed by the defendant Palmer, or as to whether Palmer was entitled to a judgment for any sum whatsoever. The judgment in this respect is in these words:

"It is further ordered, adjudged and decreed that the plaintiff have judgment against the defendant R. J. Palmer, in the sum of $229.31."

Thus it appears that no judgment whatever was entered denying Palmer relief upon his cross-complaint.

Following the entry of judgment, the defendant Palmer made a motion for a new trial. In this motion all of the six grounds mentioned in section 657 of the Code of Civil Procedure were set forth. The motion of the defendant Palmer for a new trial was granted, and in granting the same the court made the following order which we set forth in full, omitting the title:

"In the above entitled matter the defendant and cross-complainant R. J. Palmer duly and regularly noticed a motion for a new trial on the issues made by his cross-complaint in said matter, which said motion came on regularly for hearing on the 20th day of March, 1936, said cross-complainant being represented by Chas. N. Douglas, and the plaintiff and cross-defendant being represented by its attorney, Lovett K. Fraser; and it further appearing that said action was tried before the court without a jury on the 5th day of December, 1935, and that in the judgment made and rendered herein it was adjudged and decreed that the plaintiff have judgment against defendant R. J. Palmer in the sum of $229.31, and the said cross-complainant R. J. Palmer was denied any relief against the said plaintiff and cross-defendant and said motion having been submitted and duly considered by the court,

"It is now, therefore, ordered that said judgment be, and the same is hereby, vacated as to all issues made by the said cross-complaint of the said R. J. Palmer and the answer thereto, and particularly that part of said judgment which was made and entered in the above entitled court on the 14th day of February, 1936, wherein and whereby it was adjudged and decreed that the plaintiff have judgment against the said R. J. Palmer in the sum of $229.31, and denying relief to the said R. J. Palmer on the issues made by his cross-complaint.

"It is further ordered, adjudged and decreed that a new trial be, and the same is hereby granted as to all issues made by the said cross-complaint of the said R. J. Palmer and the answer thereto."

[1] From this order the plaintiff has appealed and presented for our consideration a brief in support of such appeal, but a careful consideration of that brief fails to disclose any errors on the part of the court in entering the order above referred to. The brief does take up and consider some questions as to the sufficiency of the answer filed by the plaintiff to Palmer's cross-complaint, based upon a remark of the trial court during the consideration of the cause, to the effect that the court doubted the sufficiency of the answer. It has been so frequently held that remarks of the trial court of like character, during the progress of the trial, furnish no basis

for either supporting or setting aside an order of the court subsequently made, that citation of authorities is unnecessary.

[2-5] The circumstances presented by the record in this cause are similar in want of facts to the circumstances presented in the case of Weaver v. Shell Oil Co. of California, 129 Cal.App. 232, 18 P.(2d) 736, where the law is clearly stated that the presumption in favor of the correctness of the court's order granting a new trial is set forth, to wit: "At the outset we may state that appellants' opening brief is inadequate to show error in the order granting the new trial. It is well settled that upon an appeal from an order granting a new trial, the presumption is in favor of the order and against the verdict (Wulbern v. Gilroy Express, 116 Cal.App. 222, 2 P.(2d) 508; Scott v. Southern Pac. Co., 100 Cal.App. 634, 280 P. 996; Roberts v. Southern Pac. Co., 54 Cal.App. 315, 201 P. 958; Marr v. Whistler, 49 Cal.App. 364, 193 P. 600; 2 Cal.Jur. 887), and the order will be affirmed if it may be sustained on any ground. Tasker v. Cochrane, 94 Cal.App. 361, 271 P. 503; 2 Cal.Jur. 891." In this connection we may further add that numerous cases might be cited to the effect that the burden is upon the appellant to show error. It is likewise held that where a motion for new trial is granted in general terms, if any of the grounds set forth in the motion are sufficient to sustain the order, the order granting a new trial will not be disturbed upon appeal. This applies save and except when a new trial is granted upon the grounds of insufficiency of the evidence to sustain the verdict, the order shall so specify. Tasker v. Cochrane, 94 Cal.App. 361, 271 P. 503, 504. In that case the order granting the motion for new trial is as follows:

"The motion for new trial having heretofore been submitted, the court at this time grants the motion for a new trial."

See, also, Petroff v. Nunes, 136 Cal. App. 416, 29 P.(2d) 293.

As we read the evidence set out in the transcript, the findings and judgment of the court were based principally upon the question as to whether a certain director of the Lucerne Country Club, a corporation, was present at a meeting shown by the minutes of the corporation to have been held on the 28th day of December, 1933, in the city of Los Angeles. The testimony in support of the finding of the court that a director named Mrs. D. M. Beal was not present at the time of the meeting is based upon testimony which simply fails to show a recollection on her part as to whether she was or was not present at such meeting. The record contains no testimony otherwise tending to impeach the minutes of the corporation which notes her presence at the meeting held at the place and on the date mentioned. At that meeting the compensation of R. J. Palmer was fixed by resolution of the board of the corporation then and there adopted and spread upon its minutes. This reference to the testimony shows that it is a very serious question as to whether the findings and judgment are supported by the testimony, and if not supported by the testimony, can the order of the trial court be supported on that ground upon this appeal, not to mention any of the other grounds upon which the motion for a new trial was based. It thus becomes necessary to consider the nature of the order. That it was not a general order is readily apparent by reference to the last paragraph therein, which reads as follows:

"It is further ordered, adjudged and decreed that a new trial be, and the same is hereby granted as to all issues made by the said cross-complaint of the said R. J. Palmer and the answer thereto."

In Tasker v. Cochrane, supra, this court had before it a definite language which constitutes a general order. As heretofore shown, the language of the order was simply: "The court at this time grants the motion for a new trial." No reference is there made to any specific issues or facts upon which the order was based, or to any specific issues or facts to which the subsequent trial was to be directed.

In the case of Lewis v. Southern California Edison Co., 116 Cal.App. 44, 2 P. (2d) 419, 420, a distinction was drawn between the general order mentioned in the Cochrane Case, supra, and the order there under consideration. In the Lewis Case the order read: "Motion for new trial on the part of the defendants, having heretofore been heard and submitted, it is ordered that the said motion be granted on all the grounds stated in the notice of intention to move for a new trial." The motion for a new trial set forth all six grounds. Upon a consideration of an order worded as we have just set forth, the

court held that it was not a general order, and under such an order, any of the grounds, including the insufficiency of the evidence, might be considered by the appellate court in supporting the order so made. It may also be mentioned that a hearing of said cause was denied by the Supreme Court after judgment in the District Court of Appeal. The order in the instant case is likewise not a general order. While it does not directly refer to any of the six grounds upon which the motion for a new trial was based, it does grant a new trial as to all the issues made by the cross-complaint and the answer thereto. All of the issues made by the cross-complaint and the answer thereto, and all the facts involved or tendered by the pleadings mentioned, which necessarily includes whatever testimony may be offered to support the issues there tendered and the facts to be determined by the trial court which, as has been determined in a case about to be cited, is tantamount to granting a new trial on account of the insufficiency of the testimony to support the facts as theretofore found upon the issues tendered by such pleadings.

It may be here added that the findings, conclusions of law, and judgment do not in direct terms refer to the cross-complaint or the issues there tendered.

[6, 7] If the language used by the trial court is susceptible of being interpreted as being tantamount to granting a new trial on account of the insufficiency of the evidence, it is unnecessary to use the exact language found in subdivision 7 of section 657, supra, and an appellate court may properly look into the testimony to determine whether the order should or should not be upheld. That language used in the order bearing the same import and conveying the same idea as the specific language set forth in subdivision 7 of section 657, supra, is sufficient, has been directly upheld in the case of Griffey v. Pacific Electric R. Co., 58 Cal.App. 509, 209 P. 45, 46. (Hearing denied by the Supreme Court.) We quote therefrom as follows:

"Because the order granting a new trial did not state in so many words that it was granted upon the ground of the insufficiency of the evidence to sustain the verdict, it is claimed that it must be presumed, on this appeal, that the evidence was sufficient to sustain the verdict for the full amount thereof—$10,000. This claim is based upon that provision of section 657 of the Code of Civil Procedure which, since the amendment of 1919 (St.1919, p. 141), reads: 'When a new trial is granted upon the ground of insufficiency of the evidence to sustain the verdict, the order shall so specify; otherwise, on appeal from such order, it will be presumed that the order was not based upon that ground.'

"By subdivision 5 of section 657, 'excessive damages, appearing to have been given under the influence of passion or prejudice,' is made one of the grounds for a new trial, and by subdivision 6 'insufficiency of the evidence to justify the verdict' is made another ground for a new trial. An order granting a new trial on the ground of 'excessive damages' necessarily is made under one or the other of these two subdivisions. Whether the order in the instant case was made under subdivision 6—that is, whether it was made on the ground that, irrespective of the influence of any passion or prejudice, the evidence fails to show that the pecuniary loss suffered by plaintiffs amounted to $10,000—or whether it was made under subdivision 5 on the ground that the verdict was influenced by passion and prejudice, in either case the statement in the order that it is made on the ground of 'excessive damages' is tantamount to a specification that the new trial was granted on the ground of the insufficiency of the evidence to sustain a verdict for $10,000. If a new trial on the ground of 'excessive damages' be granted under the sixth subdivision, it necessarily is granted on the ground of the insufficiency of the evidence to sustain a verdict for the amount awarded by the jury. If it be granted under the fifth subdivision, it is equally true that it is granted on the ground of the insufficiency of the evidence to sustain a verdict for an amount as great as that returned by the jury; for, as our Supreme Court has pointed out, to say that a verdict has been influenced by passion or prejudice is but another way of saying that it exceeds any amount justified by the evidence. Doolin v. Omnibus Cable Co., 125 Cal. [141] 144, 57 P. 774; Graybill v. De Young, 140 Cal. [323] 327, 73 P. 1067; Zibbell v. Southern Pac. Co., 160 Cal. [237] 254, 116 P. 513. See, also, Meinberg v. Jordan, 29 Cal.App. [760] 762, 157 P. 1005, 1007. For these reasons there is no merit in the claim that on this appeal we are precluded from determining whether the trial court abused its dis-

cretion in granting a new trial on the ground that the damages are excessive."

That what we have said is a reasonable interpretation of subdivision 7 of section 657, supra, is reinforced by the fact that the order of the court is intended to convey to all parties just what is to be presented for consideration upon a new trial, to wit: The issues tendered by the pleadings, and whether the facts set forth in the cross-complaint and the answer may or may not be supported by the testimony. That, we conclude to be the intent of the Legislature conveyed by the language used in subdivision 7, supra, to wit, sufficiency of the testimony.

The order is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

8 Cal.2d 748

McPHERSON et al. v. CITY OF LOS ANGELES et al.

L. A. 16201.

Supreme Court of California.

May 24, 1937.

1. Mandamus ⇦111

If party may by mandamus compel payment of judgment which bears interest by force of statute, he may by mandamus compel payment of interest.

2. Mandamus ⇦111

The right of property owners to secure interest on principal sum adjudged to be due them in condemnation proceeding could be determined in mandamus proceeding.

3. Mandamus ⇐3(8)

Under statute permitting property owners to have execution or restoration of possession on nonpayment of condemnation award, property owners could not maintain mandamus without showing impossibility of restoration to former position, as well as impossibility of satisfaction of award through execution (Code Civ.Proc. § 1252).

4. Mandamus ⇐3(8)

Under statute permitting property owners to have execution or restoration of possession on nonpayment of condemnation award, where littoral rights were condemned to permit diversion of streams, and diversion had not been begun, property owners' legal remedy was adequate, and they could not maintain mandamus (Code Civ. Proc. § 1252).

5. Eminent domain ⇐302

Under statute permitting property owners to have execution or restoration of possession on nonpayment of condemnation award, court may make condemnee whole on question of costs (Code Civ.Proc. § 1252).

In Bank.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Mandamus proceeding by Venita R. McPherson and others against the City of Los Angeles and others. From a judgment granting a writ of mandamus, defendants appeal.

Reversed and rendered.

Prior opinion, 62 P.(2d) 751.

Ray L. Chesebro, City Atty., James M. Stevens and Carl A. Davis, Deputy City Attys., and T. B. Cosgrove, Special Counsel, all of Los Angeles, for appellants.

Thomas Wade Cochran, Chapman & Chapman, and Ward Chapman, all of Los Angeles, for respondent Venita R. McPherson, etc.

Anderson & Anderson and William R. Law, all of Los Angeles (William H. Matson and Athearn, Chandler & Farmer, of San Francisco, of counsel), for respondent Wallis D. McPherson.

THOMPSON, Justice.

This case was transferred to this court after decision by the District Court of Appeal, Second Appellate District, Division 1, reversing a judgment that a peremptory writ of mandate should issue to compel the appellants to pay interest on a decree in a condemnation action, tried in the superior court in Tuolumne county, fixing the compensation for the condemned property. The District Court of Appeal was of the opinion that the case came within the rule that the writ of mandate cannot be used to require the payment of interest upon a principal sum admittedly due. Reliance was placed upon Howe v. Southrey, 144 Cal. 767, 78 P. 259, and Sheehan v. Board of Police Commissioners, 188 Cal. 525, 206 P. 70.

[1,2] The appellants cite in support of their contention that the writ of mandate cannot be used to compel the payment of interest upon a judgment which does not by its terms make provision therefore. Sheehan v. Board of Police Commissioners, 188 Cal. 525, 206 P. 70; Engebretson v. City of San Diego, 185 Cal. 475, 197 P. 651; Howe v. Southrey, 144 Cal. 767, 78 P. 259; Barber v. Mulford, 117 Cal. 356, 49 P. 206; Bates v. Gerber, 82 Cal. 550, 22 P. 1115; and People v. Fogg, 11 Cal. 351. All these cases reiterate the rule that the office of the writ of mandate is to compel performance of an act specifically enjoined by law, that it does not lie to enforce the obligations of contract nor to obtain a money judgment. With the exception of Howe v. Southrey, supra, none of them involve an existing interest bearing money judgment. Indeed, such cases are distinguished in Sheehan v. Board of Police Commissioners and the conclusion of the court is summed up in these words, at page 535 of 188 Cal., 206 P. 70, 75: "It follows from the foregoing review of the authorities that the petitioner and respondent herein neither had nor could obtain such a money judgment in this mandamus proceeding, as would bear interest under the provisions of sections 1915 and 1920 of the Civil Code, and hence that the trial court was in error, in its ex parte order of July 2, 1920, in so far as it undertook to direct the issuance of a writ of mandate to the appellants herein, which should include the allowance of interest upon the aggregate amount of the petitioner's pension due and unpaid." In Howe v. Southrey a judgment had been obtained in the superior court for $55 and costs against the trustees of a school district. The trustees offered to pay the $55 but refused to pay costs or interest. It was held that mandate would lie to compel the payment of the amount of the judg-

ment and costs, but not for interest, since no provision for the payment of interest was contained in the judgment. It was there said, at page 769 of 144 Cal., 78 P. 259: "As to the matter of interest, it does not appear from the petition herein that any interest was provided for in the judgment entered in the original suit. Mandamus does not lie to enforce the obligation of contracts, but only to enforce the performance of an act which the law specially enjoins. In this case it can go no farther than to compel the board to issue its requisition for the exact amount of the judgment. It cannot determine whether the obligation rests upon the district to pay interest upon the judgment, for such is not the office of the writ of mandate." With this rule we disagree. Where a judgment has been obtained which bears interest by force of statute, there seems to be no good reason for denying the remedy of mandate to compel the fulfillment of the statutory obligation to pay interest and allowing it to compel the payment of the judgment for the principal. The writ is not being used to enforce a contract obligation not to adjudicate an unliquidated claim, but merely to enforce a statutory obligation which follows automatically upon the entry of the judgment. If the decree obtained by respondents in the condemnation proceeding is a judgment which bears interest by force of statute, and the respondents are otherwise entitled to the aid of this extraordinary remedy, the writ of mandate seems to us a proper means of compelling its payment. The question is solely one of law and is concerned entirely with the existence of the statutory duty to pay interest. We see no objection to its determination in such a proceeding. In this respect Howe v. Southrey, supra, is overruled.

It is objected that the trial court erred in directing the issuance of the peremptory writ for the reason that, contrary to the recitation in the judgment, there was available to the respondents an adequate legal remedy in the levy of execution as provided in the condemnation statute. Section 1252 of the Code of Civil Procedure provides: "Payment may be made to the defendants entitled thereto, or the money may be deposited in court for the defendants, and be distributed to those entitled thereto. If the money be not so paid or deposited, the defendants may have execution as in civil cases; and if the money cannot be made on execution, the court, upon a showing to that effect, must set aside and annul the entire proceedings, and restore possession of the property to the defendant, if possession has been taken by the plaintiff."

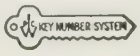
[3-5] There is nothing in the record to show that the method of enforcement provided for such cases is inadequate to compel the payment of interest if the respondents are entitled thereto. The respondents insist that collection of the interest by means of execution is impossible as a practical matter because it would be impossible to reach the fund appropriated for the payment of these awards by this method and, in order to levy execution on a judgment against a city, it is necessary to find property which is not held in a governmental capacity nor devoted to a public use. While it is true that a great deal of public property is exempt from execution (Marin Water, etc., Co. v. Sausalito, 49 Cal.App. 78, 83, 193 P. 294; United Taxpayers Co. v. City and County of San Francisco, 202 Cal. 264, 259 P. 1101), the statutory remedy for enforcement of awards in condemnation suits recognizes this practical difficulty and provides that, in case property of the city cannot be levied upon, the court must set aside the entire proceeding and restore possession if possession has been taken by the condemnor. In order to show this remedy inadequate, it appears to us that it would be necessary to make a showing that the condemnee could not be restored to his former position by the court order contemplated by section 1252. No such showing has been made here. On the contrary, while the record is bare of testimony on the subject, it appears from arguments of the parties that the property condemned consisted of littoral rights on the shores of Mono Lake, that the city had not intended an actual possession of the lake shore, but the contemplated infringement of these rights was to be by way of extraction of water from streams which flow into the lake and that such diversion would deprive the respondents of their littoral rights by lowering the water level. During the argument before the lower court, counsel for the respondents stated that they were willing to accept the statement of the engineer for the condemnor that there had been at that time no diversion of the streams from their natural courses and they were still flowing into Mono Lake. Therefore, at the time the respondents applied for this writ it did not appear that their rights were not fully

protected by the statutory remedy. If they were unable to compel the payment of interest (assuming that they were entitled thereto) by way of levy upon the property of the city, they were entitled to an order restoring their property to them unimpaired by any act of the condemnor. They have not shown this could not be done. Nor do we doubt the power of the court, on such an order, to make the condemnee whole on the question of costs.

This disposition renders it improper for us to consider the substantive question of the duty of the city to pay interest upon the award.

The judgment is reversed and the writ discharged.

We concur: SHENK, J.; LANGDON, J.; CURTIS, J.; SEAWELL, J.



8 Cal.2d 706

BAY CITIES TRANSP. CO. et al. v. JOHNSON.

S. F. 15407.

Supreme Court of California.

May 17, 1937.

Rehearing Denied June 16, 1937.

1. Taxation ⇐368

Income of each corporation in affiliated group, including that of parent foreign holding corporation not licensed to do business in state, must be included in total amount returned as income for all of them under Corporation Franchise Tax Act, though it exempts holding companies (St. 1933, p. 690, § 14; page 870, § 4; Const. art. 13, § 16, added in 1928).

2. Taxation ⇐204(2)

Rule of strict construction of taxing statutes extends to exemptions, as well as impositions, and there should be strict construction against exemption which would accomplish absurd and inequitable results.

3. Taxation ⇐204(2)

Grants of exemption from taxation cannot be allowed, unless such intention is expressed in direct terms or fairly inferable from language of instrument under which right is claimed.

4. Taxation ⇐368

Return of consolidated income can be made under Corporation Franchise Tax Act only by affiliated group of corporations subject to taxation for privilege of exercising their franchises within state, and there is no such group where parent corporation is not exercising corporate franchise in state (St.1933, p. 690, § 14; Const. art. 13, § 16, added in 1928).

In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by the Bay Cities Transportation Company and another against Charles G. Johnson, treasurer of the state of California. From a judgment for plaintiffs on the pleadings, defendant appeals.

Reversed with directions.

Prior opinion, 58 P.(2d) 393.

U. S. Webb, Atty. Gen., and H. H. Linney and James J. Arditto, Deputy Attys. Gen., for appellant.

Louis Ferrari and I. A. Cereghino, both of San Francisco, and O'Melveny, Tuller & Myers, of Los Angeles, for respondents.

PER CURIAM.

This suit was brought to recover corporation franchise taxes claimed to have been illegally levied and collected. The sole question presented is whether corporations whose common parent is a foreign corporation not licensed to do business in this state constitute an affiliated group within the meaning of the Bank and Corporation Franchise Tax Act. Stats.1929, p. 19, as amended, Deering's Gen. Laws (1931 Ed.) and Supp.1933, Act 8488.

The complaint alleges that Lawrence Warehouse Corporation during the taxable period in question was a foreign corporation, engaged solely as a holding company owning and holding all of the voting shares of the plaintiff Bay Cities Transportation Company and three other corporations, all of which were doing business in California. In a second cause of action, it is alleged that Transamerica Corporation is a foreign corporation; that it is a holding company engaged exclusively in owning and holding stocks of various corporations; and that during the same taxable period it held directly, or through ownership of all of the stock of Transamerica Bank Holding Company, in excess of 95 per cent. of the voting stock of a large number of corporations, including plaintiff

Corporation of America. Almost all of these subsidiaries, it is alleged, were doing business in California during the year 1932.

According to the complaint, each of the plaintiffs filed a consolidated return of corporation franchise taxes for the members of the group with which each was affiliated. By this means the losses of some of the members of the consolidated group were materially offset by the profits of others, resulting in a substantial reduction in the amount of the tax. These returns were not accepted by the franchise tax commissioner. He made an additional assessment of a deficiency upon each return which each of the plaintiffs paid under protest. Plaintiffs seek to recover the amounts so paid.

There is no dispute concerning the facts. By his answer the state treasurer expressly admits the allegations of the complaint, but he alleges that the corporations claimed by each of the returns to be members of an affiliated group did not comprise such a group within the meaning of the applicable tax act and that they did not have the privilege of making a consolidated return in lieu of separate returns.

Upon the issues thus tendered the plaintiffs moved for judgment on the pleadings. This motion was granted and the appeal is from the judgment which followed this ruling.

In 1928 article 13, § 16, was added to the Constitution. This section provides that "all financial, mercantile, manufacturing and business corporations doing business within the limits of this State" in lieu of other taxes "shall annually pay to the State for the privilege of exercising their corporate franchises within this State a tax according to or measured by their net income." In 1929 the Legislature passed the Bank and Corporation Franchise Tax Act, supra, to carry the constitutional provision into effect. This act, § 14, as amended in 1933 (Stats.1933, p. 690), allows affiliated corporations to make a consolidated return of income and the present controversy turns upon the construction of such provision. So far as material to the question at issue, that portion of the act reads as follows: "An affiliated group of * * * corporations shall, subject to the provisions of this section, have the privilege of making a consolidated return for any taxable year in lieu of separate returns. * * * As used in this section an affiliated group means two or more * * * corporations connected through stock ownership, * * * with a common parent corporation, if at least ninety-five per centum of the stock of each of the * * * corporations, except the common parent * * * corporation, is owned directly by one or more of the other * * * corporations, * * * and the common parent * * * corporation owns directly at least ninety-five per centum of the stock of at least one of the other * * * corporations. * * * The parent corporation and each subsidiary, a member of the group during any part of the consolidated period shall be severally liable for the tax * * * computed upon the consolidated net income of the group."

Appellant concedes that the respondent would be entitled to the benefits of this provision if the parent of each of them was a California corporation or a foreign corporation doing business in this state. But it is contended that as the parent of each of the respondents at the time the taxes were levied was a foreign corporation not licensed in this state and not taxable herein, that there was no affiliated group of corporations within the meaning of the statute.

It is apparent that section 14 of the California act was largely patterned after section 141 of the Federal Revenue Act of 1928 (26 U.S.C.A., 1928 Edition, § 2141). The provisions of the federal act were construed in the case of Commissioner of Internal Revenue v. Manus Muller & Co., Inc. (C.C.A.) 79 F.(2d) 19, 20, which presented the single question of law whether under the federal statute two domestic corporations might file a consolidated return as affiliates when their affiliation depended entirely upon the fact that a foreign corporation owned more than 95 per cent. of the shares of each. The court decided adversely to the taxpayer. It said: "When a business is single, industrially and financially, it ought to be assessed as such; there is but a single income and intramural transactions cancel each other; that is the notion which supports the affiliation. But if a foreign corporation is the only nexus which unites domestic subsidiaries—if it is the 'parent',—this theory can be realized only by bringing its income into hotchpot with the rest, just what section 141 (e), 26 U.S.C.A. § 2141 (e) [see 26 U.S.C.A. § 141 (e) note] itself forbids. To eliminate that income and still to treat as a unit those companies which are a unit only because the excluded foreign corporation holds their shares, is to deny the premise and

affirm the conclusion. True, it would not compromise the result in practice when the 'parent' had no income, but those would be uncommon instances. There are indeed circumstances which may justify such a course and subdivision (e) mentions one; an affiliation in which an insurance company is 'parent.' Corner Broadway-Maiden Lane, Inc., v. Commissioner, 76 F.(2d) 106 (C.C.A. 2). But the income of the 'parent' can there be taxed, and is excluded from the consolidated return only because a different rate and method of assessment apply to it. The income of a foreign corporation cannot be taxed, except so far as it arises in this country."

Section 141 (e) of the Federal Revenue Act of 1928 (26 U.S.C.A. § 141 (e) note) provided in part: "A consolidated return shall be made only for the domestic corporations within the affiliated group." This provision might imply that foreign corporations could be members of an affiliated group for all purposes, but the inclusion of their incomes in the consolidated return. But in the Manus Muller Case the court said, "Though that no doubt is the natural meaning, it is not the inevitable one." As negativing the implication of section 141 (e), the court pointed to another provision of the act, which declared that "a foreign corporation shall not be deemed to be affiliated with any other corporation within the meaning of section 141 or 142." Section 238 (26 U.S.C.A. § 238 note). Considering these two sections in connection with the other provisions of the act, the court held that if the parent corporation was a foreign corporation not taxable under any act, the subsidiaries could not file a return of consolidated income.

[1] Provisions similiar to sections 141 (e) and 238 of the federal act are not found in the California statute, but this is not decisive. The one section expressly contradicted the implication of the other. Of more importance is the direction found in the 1933 amendment to section 14 of our statute that "if a consolidated return is made subject to the provisions of this section, the tax imposed under this act shall be computed as a unit upon the consolidated net income of the group." This certainly requires that the income of each corporation in the group shall be included in the total amount returned as income for all.

Respondents insist, however, that in the present case the income of the parent corporations need not be brought into hotchpot with the rest because the statute exempts holding companies. Section 4, as amended in 1933, Stats.1933, p. 870. Such a construction would require the franchise tax commissioner to determine whether a foreign corporation is entitled to exemption while it stands beyond the borders of the state with its books and records. To apply such a rule in this case would mean that the respondents, not choosing to transact business within the state, may nevertheless claim the exemption allowed holding companies exercising their corporate franchises within this state.

The plain provisions of the act do not admit of any such construction. To allow foreign corporations not licensed to do business in California to set off losses sustained outside of the state against the income of California corporations whose income is subject to tax, would entirely defeat the governmental purpose of the constitutional amendment and the statute enacted pursuant to it. By this means the taxes which corporations doing business in California should pay for that privilege could be avoided. If corporations receive the benefits of California operations, they must be willing to accept the obligations which go with those benefits. To claim the exemption allowed by our tax statute, a foreign corporation must come into this state where its business may be subjected to the legitimate inquiry which the state may demand in connection with taxation.

[2-4] The respondents invoke the rule of strict construction of a taxing statute. But the rule extends to exemptions as well as impositions and there should be a strict construction against an exemption which would accomplish absurd and inequitable results. In re Estate of Bull, 153 Cal. 715, 96 P. 366. "Grants of exemption from taxation cannot be allowed, unless the intention to do so is expressed in direct terms or is fairly inferable from the language of the instrument by which the right is claimed." Cypress Lawn, etc., Ass'n v. San Francisco, 211 Cal. 387, 390, 295 P. 813, 814. The language of the corporation tax statute when considered in the light of its purpose makes certain that there can be no return of consolidated income unless there is an affiliated group of corporations subject to taxation for the privilege of exercising

their corporate franchises within this state. If the parent corporation is not exercising its corporate franchise in California, there is no affiliated group within the meaning of the act.

The judgment is reversed with directions to the trial court to enter judgment for the appellant.



9 Cal.2d 1

CITY OF SAN MATEO et al. v. RAILROAD COMMISSION.

S. F. 15700.

Supreme Court of California.

May 26, 1937.

1. Railroads ⇐99(11)

Finding by Railroad Commission that public user of certain crossings of street with railroad was insufficient to create a public crossing was not open to review since it was a finding of fact (St.1933, p. 1157, § 67).

2. Railroads ⇐99(11)

Railroad Commission's findings as to necessity in interest of public safety for closing certain grade crossings at street intersections with railroad was not reviewable by Supreme Court.

3. Public service commissions ⇐2

The plenary and unlimited power given Legislature by Constitution to confer additional powers on Railroad Commission consistent with power to regulate utilities given commission by Constitution is unlimited, provided additional powers are cognate and germane to regulation of public utilities (Const. art. 12, § 22, as amended in 1911; § 23, as amended in 1914).

4. Railroads ⇐99(5)

Railroad Commission has power to compel separation of grades at existing crossings of road or street with railroad under Constitution and statutes (St.1911, Ex.Sess., p. 40, § 43(a, b); Const. art. 12, § 22, as amended in 1911; § 23, as amended in 1914).

5. Municipal corporations ⇐56

Proviso of constitutional amendment that section should not affect such powers of control over public utilities relating to enforcement of certain regulations "vested" in any city which city should vote to retain refers to such powers of control as were then lodged in municipalities and such as were beyond power of Legislature to withdraw without city's consent (Const. art. 12, § 23, as amended in 1914).

[Ed. Note.—For other definitions of "Vest," see Words & Phrases.]

6. Municipal corporations ⇐57

"Vested" power of municipalities is derived from State Constitution and to extent there permitted.

7. Municipal corporations ⇐56

Municipalities organized under general Municipal Corporations Act do not enjoy "vested" power within meaning of proviso to constitutional amendment reserving certain "vested" powers which municipality might vote to retain (Const. art. 12, § 22, as amended in 1911; § 23, as amended in 1914).

8. Public service commissions ⇐7

Purpose of constitutional amendment authorizing Railroad Commission to supervise and regulate public utilities was to vest commission with power to fix rates of all privately owned public utilities whether located within or without or partly within and partly without municipality (Const. art. 12, § 22, as amended in 1911; § 23, as amended in 1914).

9. Municipal corporations ⇐618

Constitutional amendment, retaining in cities "vested" power of control over public utilities, referred to such powers then in existence as related to local, police, sanitary, and other regulations in chartered cities, other than fixing of rates, to those related to municipal affairs, and those assumed by such cities by appropriate charter provision (St.1911, Ex.Sess., p. 168; Const. art. 12, § 22, as amended in 1911; § 23, as amended in 1914).

10. Railroads ⇐99(5)

The Railroad Commission has authority under Constitution and statutes to abolish hazardous and unnecessary grade crossings with railroad performing state-wide service, which is binding on cities organized under general law and on those cities organized under general law at time of adoption of constitutional amendment retaining in cities such vested power of control over public utilities as they then possessed, even though such cities were thereafter organized under freeholder charters, on ground that authority

is germane to regulation of railroads performing state-wide service (St.1911, Ex.Sess., p. 40, § 43; St.1933, p. 1157, § 67; p. 2227, § 43; Const. art. 11, §§ 6, 8, 11; Const. art. 12, § 22, as amended in 1911; § 23, as amended in 1914).

11. Eminent domain ⇐90

Where contractual rights and obligations of railroad and property owners in vicinity of crossing, with respect to private crossings of road with railroad ordered closed by Railroad Commission, were not adversely affected because order was subject to such rights, the property owners were not entitled to object on ground property rights were taken without ascertainment and payment of damages.

12. Eminent domain ⇐85

As respects right to object to closing of hazardous road crossing with railroad, property rights of owners in vicinity contiguous to state or county highways consisted only of easement for purpose of ingress and egress.

13. Eminent domain ⇐90

Property owners in vicinity of hazardous road crossing with railroad closed by order of Railroad Commission were not entitled to object to closing on ground they were deprived of property rights without payment of damages where owners were not deprived of any rights of ingress or egress.

In Bank.

Petition by the City of San Mateo and others to review an order of the Railroad Commission.

Order affirmed.

Ernest A. Wilson, City Atty., of San Mateo, and Albert Mansfield, City Atty., of Redwood City (Kirkbride & Wilson, of San Mateo, and William J. Locke, of Alameda, of counsel), for petitioners.

Ira H. Rowell, Roderick B. Cassidy and Gilmore Tillman, both of San Francisco, for respondent.

SHENK, Justice.

The cities of San Mateo, Redwood City, and San Carlos have joined in a petition to review an order of the respondent Railroad Commission which requires the closing of or the separation of grades at five railroad grade crossings located within the boundaries of said cities.

[1] The crossings are formed by the intersection at grade of streets or roads and the right of way of the Southern Pacific Company. A fact-finding committee composed of representatives of the Peninsula grade crossing conference, a civic organization, state chamber of commerce, Southern Pacific Company, the cities of San Mateo, Redwood City, Belmont, San Carlos, San Mateo county planning commission, and the engineering department of the Railroad Commission, made a comprehensive and thorough survey of crossing conditions in this area and joined in a report on the subject which was made a part of the record before the commission. Thereafter a complaint was filed with the Railroad Commission at the instance of Peninsula grade crossing conference, seeking action on the part of the commission to the end that fatalities due to accidents at the numerous grade crossings between the northerly limits of the city of San Mateo and the southerly limits of Redwood City be minimized. After notice to the railroad company and to the municipalities involved, the commission ordered the closing of or the separation of the grades at, Thirty-ninth avenue in San Mateo, Eaton road in San Carlos, and Beech street in Redwood City. It directed the Southern Pacific Company forthwith, by the installation and maintenance of suitable gates or other structures, physically to close to public use the crossings known as Mills avenue in San Mateo and Hull crossing in San Carlos, subject to any private rights of easement or contractual obligation of the railroad company. The commission found that the ways traversing the right of way at these points had not been formally dedicated to public use and that the evidence of public user was insufficient to create a public crossing. No question of the propriety of this finding is raised. It is a finding of fact and is not open to review. Section 67, Public Utilities Act, Stats.1915, pp. 115, 161 (as amended by St.1933, p. 1157).

The validity of the commission's order in connection with the Thirty-ninth avenue crossing in San Mateo, the Eaton road crossing in San Carlos, and the Beech street crossing in Redwood City is specially questioned by the petitioners. At each of these crossings the railroad right of way is traversed by a public city street or way which connects El Camino Real, a state highway parallel and contiguous to

the railroad right of way, with a parallel county road on the opposite side of the railroad right of way. The Thirty-ninth avenue and Beech street crossings continue beyond the respective connected highways.

It appeared in the proceedings before the commission that there are thirty grade crossings within the 9 mile strip involved. One-half of them carries 90 per cent. of the traffic which crosses the tracks. As to the three crossings dedicated to public use which are here involved, the commission found from the record of fatal accidents in the area that grade-crossing conditions were bad and that those conditions could be greatly improved by concentrating traffic at the minimum number of crossings consistent with public convenience and providing adequate protection at the crossings to be used. It also found that the limited use by the public of the crossings affected by the order indicated that public convenience did not require their continuance; that the hazard to public safety which they represented required that they be closed; and that their closing would greatly reduce the hazard to life and property. The commission directed that the railroad company "forthwith, by the installation and maintenance of suitable physical structures, and/or any change of the existing grade" physically close such crossings to public use. The order also directed the members of the council of each city to do all things necessary or required under the law to divest the area of such public streets as traversed the railroad right of way of its public character.

[2, 3] It is beyond question here that the findings of the commission of the necessity, in the interest of the public safety, for the closing of the grade crossings involved has been established. The question then is as to what public authority has the power to compel it. The commission asserts power to that end under the provisions of the Constitution and the Public Utilities Act. The constitutional sections relied upon are section 22 of article 12, as amended in 1911 (see St. 1911, p. 2048) and section 23 of the same article as amended in 1914 (see St. 1913, p. 1740). Section 22 as amended enlarged the power of the commission in the regulation and control of railroad companies and in addition contained the following comprehensive grant of power to the Legislature:

"No provision of this Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon the Railroad Commission additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the Railroad Commission in this Constitution, and the authority of the Legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this Constitution."

Again in section 23 is found the following very broad grant of power to the Legislature:

"The Railroad Commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the State of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the Legislature, and the right of the Legislature to confer powers upon the Railroad Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution."

The powers thus conferred have been declared to be unlimited, provided the legislative act conferring additional powers on the commission shall relate to matters cognate and germane to the regulation of public utilities. Pacific Tel. & Tel. Co. v. Eshleman, 166 Cal. 640, 137 P. 1119, 52 L.R.A.(N.S.) 652, Ann.Cas.1915C, 822.

[4] Under the foregoing authority of the Constitution and the Public Utilities Act, the commission since 1911 has had the power conferred by section 43 (b) of the act to abolish existing grade crossings or to order the separation of grades at such crossings. Stats.1911, Ex.Sess., pp. 18, 40. That section in subparagraph (a) has likewise since 1911 prohibited the establishment of new grade crossings without the consent of the commission. Subparagraph (b) as originally enacted has authorized and as now in effect authorizes the commission to order the elimination of existing grade crossings or to compel a separation of grades at such crossings and make elaborate provisions for accomplishing those results. The power of the commission to compel a separation of grades at existing crossings was recognized in

Civic Center Ass'n v. Railroad Commission, 175 Cal. 441, 166 P. 351, and S. H. Chase Lumber Company v. Railroad Commission, 212 Cal. 691, 300 P. 12. Like power to compel the closing of existing grade crossings upon a proper showing and upon the conditions stated in the Chase Lumber Company case as to the rights of private property owners must be deemed to be lodged in the commission unless the Legislature has been deprived of the power to confer it by the following proviso in section 23 of article 12 of the Constitution as amended in 1914:

"Provided, however, that this section shall not affect such powers of control over public utilities as relate to the making and enforcement of local, police, sanitary and other regulations, other than the fixing of rates, vested in any city and county or incorporated city or town as, at an election to be held pursuant to law, a majority of the qualified electors of such city and county, or incorporated city or town, as, at an election to be held pursuant to law, a majority of the qualified electors of such city and county, or incorporated city or town, voting thereon, shall vote to retain, and until such election such powers shall continue unimpaired."

[5-7] It is the contention of the petitioners that the foregoing proviso had the effect of depriving the Legislature of all power to confer upon the commission authority to abolish grade crossings in said cities for the reason, so it is claimed, that the power over the subject-matter was and is vested in said municipalities.

The history of the proviso indicates that it was inserted at the instance of representatives of certain freeholders' charter cities who were apprehensive lest powers then vested in corporate municipal bodies be improvidently taken away. The argument sent to the voters at the election at which the constitutional amendment was submitted and adopted referred to the proviso as reserving to cities "those powers now vested in it," and added the following: "This provision was deemed advisable, since our cities are now possessed of certain constitutional powers to the arbitrary revocation of which they might be reluctant to submit." The important question now is as to the significance to be attached to the term "vested" as used in the proviso. What power should be deemed to be vested in municipalities thereunder and to what particular time should the reservation of such vested power relate?

The term "vested" found in the proviso as originally adopted in 1911 (see St.1911, p. 2164) must be deemed to refer to "such powers of control over" public utilities as were then lodged in municipalities and such as were beyond the power of the Legislature to withdraw without the cities' consent. Whatever vested power the municipalities of the state enjoy they derive from the State Constitution and to the extent there permitted. And the only municipalities in the state vested with immunity from control of the Legislature are freeholders' charter cities organized under section 8 of article 11 of the Constitution. The immunity from legislative control is limited to municipal affairs and to the extent specified by sections 6 and 11 of the same article. With respect to other matters charter cities are subject to and controlled by general laws. Municipalities organized under the general Municipal Corporations Act possess no powers which are not subject to and controlled by general laws, and do not enjoy "vested" powers within the meaning of the proviso of section 23, article 12, as originally adopted in 1911. The same conclusion must be drawn as to the effect of the amendment of the proviso in 1914. The amendment qualified the powers of control which should continue by limiting them to such "as relate to the making and enforcement of local, police, sanitary and other regulations, other than the fixing of rates."

[8] The obvious purpose of the amendment of 1914 was to vest in the Railroad Commission the power to fix the rates of all privately owned public utilities in the state whether the same be located within or without or partly within and partly without a municipality.

[9] Since the adoption of the Constitution of 1879, section 11 of article 11 has provided that "any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." This power has been available to all cities. As to such regulations as come within the definition of municipal affairs, the city could remove itself from the operation of general laws by organizing under a freeholders' charter, but all cities organized under general law have been and are subject in their activities to the restriction that the regulations under that section must not be

in conflict with general laws. Uncharted cities may adopt regulations, local, police, and sanitary in character, which are not in conflict with general laws. In a limited sense, such power is vested in the municipality but always subject to the power of the Legislature to wipe it out by a conflicting general law on the same subject. From the history of the proviso in question and its relation to other provisions of the Constitution, it must be concluded that the term "vested" as used in the proviso, referred to powers of control over public utilities (1) such as related to the making and enforcement of local, police, sanitary, and other regulations in chartered cities (other than the fixing of rate); (2) such as related to municipal affairs; and (3) such as had been assumed by such cities by appropriate charter provision. This was the holding, and properly so, in Mountain View v. Southern Pacific R. R. Co. (1934) 1 Cal.App.(2d) 317, 36 P.(2d) 650.

The history and context of the proviso in section 23 also indicates that the reservation to cities therein contained was intended to relate to such powers of control as were vested in cities at the time the proviso was adopted. This is shown by other language of the proviso authorizing a vote on the question of what powers the cities desired to "retain" and that until such powers be surrendered by popular vote "such powers shall continue unimpaired." If such powers were not then in existence, there was nothing to retain and nothing to continue in effect. Also it appears that at the special session held soon after the adoption of the constitutional amendment in 1911 the Legislature enacted a statute providing in elaborate fashion the procedure to be followed in submitting to a vote of the electors of cities the question of the retention or surrender of powers of control over public utilities. Stats.Ex.Sess.1911, p. 168. The entire statute proceeds upon the theory that the subject-matter of retention and surrender relates to powers then possessed by municipalities subject to the operation of the proviso. This court on numerous occasions has referred to the powers deemed vested under the constitutional proviso as those which were vested at the time of the adoption thereof and of the adoption of the Public Utilities Act. Title Guarantee & Trust Co. v. Railroad Commission, 168 Cal. 295, 142 P. 878, Ann.Cas.1916A, 738; Oro Electric Corp. v. Railroad Commission, 169 Cal. 466, 147 P. 118; Los Angeles v. Central Trust Co., 173 Cal. 323, 159 P. 1169; Civic Center Ass'n v. Railroad Commission, 175 Cal. 441, 166 P. 351.

[10] The city of San Carlos was organized under general law as a city of the sixth class in 1925. In 1911 and 1914 the cities of San Mateo and Redwood City were organized and existing by virtue of general law. San Mateo adopted a freeholders' charter in 1923, and Redwood City took similar action in 1929. Until their charters were adopted, those cities were subject to and controlled by general laws. At the time of the adoption thereof those cities gathered unto themselves and became vested with the control of affairs municipal, but it does not follow that thereby those cities were vested with such powers in 1911 when the constitutional proviso was adopted or in 1912 when the Public Utilities Act was passed. The city of San Carlos therefore has been and is subject to the provisions of section 43 of the Public Utilities Act as originally enacted (St.1911, Ex.Sess., p. 40) and as amended in 1933 (St.1933, p. 2227). The cities of San Mateo and Redwood City were likewise subject to said section 43 as a general law until the adoption of their charters and are still subject thereto, including the amendment of 1933, if the subject-matter of the elimination of railroad grade crossings is germane to the subject of the regulation of public utilities in this state.

In these days of heavy automobile traffic the hazards to life and limb by reason of the numerous railroad crossings at grade is a matter of great public concern. To eliminate unnecessary grade crossings and to minimize the hazards created thereby has become a definite governmental state policy. To effectuate the desired results, it is necessary that some public authority be vested with power to compel compliance with regulatory orders. The Constitution and statutes have vested that power in the Railroad Commission. The power so vested has been recognized and approved as to the separation of grades at railroad crossings even in cities organized under a freeholders' charter which had appropriately assumed control of its municipal affairs, prior to the adoption of the

constitutional proviso. Civic Center Ass'n v. Railroad Comm., 175 Cal. 441, 166 P. 351. It was also held in that case that the question of the elimination of grade crossings in such a city by providing a separation of grades was a matter of state concern as distinguished from a municipal affair. Such an application of the proviso as was made in that case would not have been proper except on the theory that the elimination of railroad crossings at grade is also germane to the subject of railroad regulation in this state. Whether the question of the elimination of grade crossing by a physical closing thereof without providing the alternative of a separation of grades to afford continuance of the public use of the highway approaches to the crossing has been reserved under the proviso to such a chartered city and whether such a physical closing in such a city is a matter of state concern are not involved here. It must be concluded, however, that the subject of abolishing such grade crossings by the physical closing thereof is germane to the regulation of a railroad corporation performing statewide or more than local service; that the Railroad Commission has been vested with such power of regulation and control by the Constitution and by section 43 (b) of the Public Utilities Act; and that the commission's orders in that behalf are binding on the authorities of cities now organized under general law and of those cities which were organized under general law at the time the proviso in section 23 of article 12 of the Constitution was adopted, even though such cities were thereafter organized under freeholders' charters. The cities of San Mateo and Redwood City fall within the latter classification.

The petitioners rely on Red Bluff v. Southern Pacific Company, 44 Cal.App. 667, 187 P. 152. There the action was by the city to have the company remove obstructions placed upon a crossing at grade under a contract giving permission for the temporary occupancy thereof. It was held that the city had the right to bring an action to enforce the contractual obligation to remove the obstructions upon the termination of the contract. The defense that the Railroad Commission had exclusive jurisdiction in the matter was rejected. The commission was not seeking to exercise any power vested in it with respect to said crossing. Anything said in the opinion in that case which is contrary to the views herein expressed is necessarily disapproved.

[11-13] In the proceedings before the commission, several persons owning real property in the vicinity filed objections to the closing of the crossings on the ground that such closing would deprive them of rights of property without an appropriate ascertainment and payment of damages in accordance with the rule stated in S. H. Chase Lumber Co. v. Railroad Commission, 212 Cal. 691, 300 P. 12; Eachus v. Los Angeles Electric Ry. Co., 103 Cal. 614, 37 P. 750, 751, 42 Am.St.Rep. 149, and similar cases. The contractual rights and obligations of property owners and the railroad company with respect to the two private crossings ordered to be closed are not adversely affected by the order for the reason that the order was made expressly subject to those rights. Whether the real property of the objecting owners abuts on any of the public area ordered to be closed does not appear in the record certified to us by the commission. Nor does that fact, if it be the fact, appear in the decision and order of the commission. We therefore assume that property other than that of the railroad company does not directly abut upon any of the area directed to be closed, and that the private property in question is contiguous to either the county or the state highways which are connected by such public crossings. If such be the case, no obstruction to the ingress and egress from those highways has been created by the order of the commission. The nature of such private property rights or easements has been defined as the right of an abutting owner to light, air and access to the street (20 Cor.Jur. 689, 690, and cases cited), and as "an easement in the street fronting upon his lot, for the purposes of ingress and egress" (Eachus v. Los Angeles Electric Ry. Co., supra). It does not appear that any such rights of the objecting property owners have been taken from them. Certain it is that the commission has not attempted to adjudicate such rights, if any exist, and the property owners objecting before the commission are not parties to the present proceeding. So far as the record shows, the objectors

have mistaken the character of their right to the use of the crossing area, which is in the nature of a public rather than of a private or property right.

The order is affirmed.

We concur: THOMPSON, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.



8 Cal.2d 719

FOSTER v. FOSTER.

L. A. 15528.

Supreme Court of California.

May 19, 1937.

Rehearing Denied June 17, 1937.

1. **Divorce** ⟸303(1)

A court may change or modify its decree awarding custody of child of divorced parents to either party in divorce proceeding, under statute (Civ.Code, § 138).

2. **Divorce** ⟸332

Generally, order of court of another state determining child's custody in divorce proceeding will be modified only if change of circumstances makes modification advisable from point of view of welfare of child.

3. **Divorce** ⟸303(2)

Generally, court, under statute, will modify order determining child's custody in divorce proceeding only if there has been change of circumstances, or if facts were unknown to party urging them at time of order, and could not, with due diligence, have been ascertained (Civ.Code, § 138).

4. **Divorce** ⟸332

Under finding that there had been no change of circumstances affecting child's welfare subsequent to decree of court of another state determining child's custody in divorce proceeding, and where prior circumstances were not shown to require modification of such decree, trial court properly gave such decree full faith and credit, and refused to modify such decree.

5. **Divorce** ⟸332

The general rule that order of court of another state determining child's custody in divorce proceeding will not be modified unless change of circumstances requires modification applies unless secret or hidden facts or other circumstances require modification in view of child's welfare, which is of paramount importance.

6. **Divorce** ⟸332

A decree of court of another state determining child's custody in divorce proceeding was not void, so as to authorize investigation of such issue de novo, because child was temporarily absent from state for his health, where parent attacking decree was personally served, and both parents appeared.

7. **Divorce** ⟸303(3), 312

An application for modification of award of custody of child is addressed to sound legal discretion of trial court, and its discretion will not be disturbed unless record presents clear case of abuse of discretion.

8. **Appeal and error** ⟸994(3), 1011(1)

The credibility of witnesses is for determination of trial court, and appellate court will not disturb findings where there is substantial conflict in evidence.

9. **Divorce** ⟸332

Evidence as to whether child's health required his living with mother in California throughout whole year, and as to child's welfare, supported judgment refusing to modify decree of another state, entered in divorce proceeding, giving mother custody of child three months of year and father custody for the remainder.

10. **Divorce** ⟸303(2)

In determining whether decree determining child's custody should be modified, court proceeds upon new facts, considered in connection with facts formerly established, change of circumstances, conduct of parties, and best interests of child.

11. **Divorce** ⟸332

In proceeding to determine child's custody as between parents, court properly admitted in evidence records showing findings of fact and conclusions of law of court of another state which rendered decree determining child's custody in divorce proceeding.

12. **Divorce** ⟸332

In proceeding to determine child's custody as between parents, admission in evidence of order of court of another state, which entered decree determining child's custody in divorce proceeding, restraining mother from destroying furniture in home,

running up bills, and removing child from court's jurisdiction, was improper, but not prejudicial to mother.

13. Appeal and error ⇐843(2)

Where petitioner filed statutory motion for disqualification of judge from passing upon any matter except making, signing, and filing of findings of fact and conclusions of law and judgment, and judge took no other action, whether judge should have been disqualified was moot question which would not be considered on appeal (Code Civ.Proc. § 170, as amended by St.1933, p. 1828).

In Bank.

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

Proceeding by Iva Gilbertson Foster against John Morrell Foster, wherein defendant filed a cross-complaint. From a judgment for defendant, petitioner appeals, and defendant files motion to dismiss or affirm.

Motion denied; judgment affirmed on the merits.

Walter F. Haas, Stanley F. Maurseth, Gerald E. Kerrin, Maurseth & Kerrin, and H. C. Johnston, all of Los Angeles, for appellant.

Gurney E. Newlin and Michael G. Luddy, both of Los Angeles, for respondent.

CURTIS, Justice.

This is an appeal from a judgment of the superior court of Los Angeles county in favor of respondent, refusing to grant petitioner's application for the sole and exclusive custody of the minor adopted child of petitioner and respondent, which custody had formerly been granted by the circuit court in and for the county of Minnehaha, S. D., second judicial district, in the divorce action between petitioner and respondent, to petitioner for three months of each year and to respondent for nine months of each year. This controversy over the custody of Whitney Foster, the adopted child of the parties, has been before this court on two previous occasions, once on prohibition proceedings (Foster v. Superior Court, 4 Cal.(2d) 125, 47 P.(2d) 701), and later on supersedeas proceedings. Foster v. Foster, 5 Cal.(2d) 669, 55 P.(2d) 1175. It has also been before the District Court of Appeal on prohibition proceedings. Foster v. Superior Court, 4 Cal.App.(2d) 466, 41 P.(2d) 187. The following is a short résumé of the legal steps taken in the controversy: John Morrell Foster, respondent herein, and Iva Gilbertson Foster, appellant herein, were divorced in South Dakota, and the decree was made and entered on March 1, 1933. This decree of the circuit court in and for the county of Minnehaha, S. D., second judicial district (hereinafter referred to as the South Dakota decree), provided that Whitney Foster, who had been adopted by the parties shortly after his birth in May, 1927, should remain in the care and custody of his foster father from September 10th of each year until June 10th of the following year, and that he should remain in the custody of his foster mother from June 10th until September 10th of each year. In the early part of January, 1931, Whitney had been taken to Arizona for his health by reason of an asthmatic condition existing at that time, where he remained until June, 1931. The complaint in the divorce action was filed by John Morrell Foster on July 22, 1931, and in November, 1931, Mrs. Foster, to whom the temporary custody of Whitney had been awarded pending the divorce decree, secured an order of the South Dakota court in which the divorce action was pending permitting her to remove Whitney from South Dakota to Phoenix, Ariz. He remained in Phoenix, Ariz., under the care of a Mrs. Della Whitman from November, 1931, until April 10, 1933, with the result that at the time of the entry of the divorce decree on March 1, 1933, he was physically absent from the jurisdiction of the South Dakota court. In June, 1933, appellant moved to California and established her residence in the city of Beverly Hills, bringing Whitney with her for the three months' period designated in the divorce decree. He was returned to his father at Sioux Falls, S. D., in September, 1933, and in June, 1934, returned to his mother at Beverly Hills. In August, 1934, Mrs. Foster wrote to respondent, stating that Whitney, by reason of a sinus infection, had been under the care of two doctors who believed that his health would be improved by continued residence in Southern California, and requesting permission to keep the boy with her. Upon this permission being refused, Mrs. Foster petitioned the superior court of Los Angeles, for the sole and exclusive custody of the child, and obtained an order for the continued temporary custody of the

child. John Morrell Foster thereupon filed an answer setting up the South Dakota decree, and also a cross-complaint praying for the sole and exclusive custody of the child. The petition was based principally upon the contention that the climate of South Dakota, with its severe changes in temperature and its dust storms, is very detrimental to the child's health; that each time she has received the child from Sioux Falls, S. D., he has been run down physically, and that each time she has returned the child to his father after three months in the warm, equitable climate of Southern California under the care of competent physicians, he has been in splendid physical condition. She alleged in her petition that Whitney was suffering from chronic bronchitis, asthma, and chronic ethmoid sinusitis, and that the treatments which he was receiving for such ailments must necessarily be continued in the mild climate of Southern California in order that a lasting beneficial effect might be had upon his health and in order to ultimately effect a permanent cure.

Upon the termination of the hearing, at which several doctors corroborated the allegations of appellant's petition as to Whitney's physical condition, and at which depositions of two doctors of Sioux Falls, S. D., two specialists of Los Angeles, and a specialist of Chicago were introduced by respondent, the court on December 12, 1934, made, signed, and filed with the clerk of the court a written memorandum opinion in favor of the father continuing in effect the South Dakota decree. After the filing of the written memorandum opinion, and prior to the signing of findings of facts and conclusions of law, and before the signing or entry of any judgment, the respondent sought an order to transfer to him the temporary custody of the minor child which theretofore had been given to his mother. The effect of such an order would have been to transfer to respondent the custody of the minor child during the pendency of any appeal from the judgment. The appellant, therefore, sought in the District Court of Appeal, Second Appellate District, Division 2, a writ of prohibition to prohibit the trial court from making an order changing the temporary custody of the child. This writ was denied by the District Court of Appeal on February 8, 1935, upon the ground that, as an appeal from the judgment to be entered in the action would necessarily be taken to the Supreme Court, this court was the proper court to which to make application for the writ. Foster v. Superior Court, 4 Cal. App.(2d) 466, 41 P.(2d) 187. The application was thereafter made to the Supreme Court on February 11, 1935, and on July 30, 1935 the writ of prohibition was duly issued by the Supreme Court restraining the superior court of Los Angeles county from making or ordering the execution of any judgment or decree which should have the effect of placing Whitney Foster beyond the operation of process of the court prior to the final determination of the action. On September 5, 1935, findings of facts and conclusions of law and judgment were filed in favor of respondent refusing to modify the decree of the South Dakota court. On September 8, 1935, appellant perfected her appeal to this court. On September 16, 1935, appellant filed a petition for a writ of supersedeas in this court, praying that the superior court of the county of Los Angeles be restrained from enforcing the terms of said judgment with reference to the custody of the child during the pendency of the appeal by appellant. On March 24, 1936, this writ was denied upon the ground that such writ was unnecessary as a perfected appeal automatically constituted a stay of proceedings and precluded the trial court from interfering with the custody of the child as it existed at the time of the appeal, and that, as the appellant was entitled to the custody of the child upon the date of the entry of the judgment under the previous order of the court granting her temporary custody, appellant was entitled to retain custody of the child until the final determination of the judgment. Foster v. Foster, 5 Cal.(2d) 669, 55 P.(2d) 1175. Thereafter, on July 7, 1936, respondent upon notice to appellant moved to dismiss the appeal or affirm the judgment. Respondent's brief on the merits was already on file at the time said motion was made. On the hearing of said motion, the court upon the consent of both parties ordered the motion and the cause upon its merits transferred to the ready for submission docket. The effect of this order was a denial of the motion and a direction that the case will be submitted and disposed of as the regular business of the court will permit. Dos Pueblos Ranch & Improvement Company v. Ellis (Cal.Sup.) 67 P.(2d) 340. However, to avoid all uncertainty in the matter, the motion to dismiss or af-

firm is denied. Accordingly the appeal is now before us on its merits.

Three main questions are presented upon this appeal:

(1) Was the trial court correct in holding that, in the absence of a change of circumstances or conditions affecting the welfare of the minor child, the decree of the court of another state was entitled on principles of comity to full faith and credit in this state?

(2) Did the South Dakota court retain jurisdiction to determine the whole subject matter of the divorce action which included the custody of the minor child of the parties, despite the absence of the child from the state of South Dakota under permissive order of the South Dakota court at the time of the entry of the decree, when both parties were domiciled within the jurisdiction of the court at the time of the commencement of the action and the defendant had been personally served and appeared?

(3) Were the findings of the trial court upon the hearing of the petition for the sole and exclusive custody of the child by petitioner supported by substantial evidence?

The answer to each of these three questions must be an emphatic and unequivocal affirmative. No other conclusion is possible under the authorities cited and the record presented in this case. We shall discuss each of the questions in the order above set out.

[1-3] The jurisdiction of the superior court of the county of Los Angeles to make an order modifying the South Dakota decree cannot be challenged upon the ground that the decree of South Dakota was res judicata and could not be changed. It is well recognized that a decree of a court in this state awarding the custody of a minor child of divorced parents to either party in a divorce proceeding has no permanent finality and that it is later subject to change and modification by the same court. This power is expressly reserved to that court by section 138 of the Civil Code. This rule that custody orders are subject to modification applies not only to such orders made and entered by courts of this state, but also to such former orders of courts of other states. As was said in Anthony v. Tarpley, 45 Cal.App. 72, 79, 187 P. 779, 782: "The child being within this jurisdiction, the courts of this state are not precluded by any judgment or order of a sister state from inquiring into and determining in its own behalf what are the best interests of the child." It is well established, however, that such original decree is final in the sense that it is not possible for the dissatisfied party to keep the courts continually occupied with suits seeking to change the former order of the court with reference to the custody of the child, and that, until some change of circumstance arises which makes a modification of the former order of custody advisable from the point of view of the welfare of the child, the court will give effect to the former order and will refuse to make any modification of such order. In Olson v. Olson, 95 Cal.App. 594, 597, 272 P. 1113, 1114, which involved a custody decree made and entered in this state, is to be found the following language: "There can be no doubt that where jurisdiction to grant a divorce and award the custody of the minor children of the marriage once attaches, that jurisdiction is, under our statute, a continuing one, so that the power to amend, modify, or annul an order of custody for the welfare of children as existing conditions may demand, ever after remains. But this does not mean the parties to such litigation may, after a court has once heard evidence upon the subject of their fitness to act and ruled upon the question, immediately again invoke the powers of the court to have it inquire into the same or other facts existing at the time of or prior to the former decree. Such holding would lay a foundation for interminable and vexatious litigation. * * * The rule is stated to be that to justify a modification there must be a change of circumstances arising after the original decree is entered, or at least a showing that the facts were unknown to the party urging them at the time of the prior order, and could not with due diligence have been ascertained. 19 Cor.Jur. 350."

This same rule that former decrees of custody may be modified only upon a showing of change of circumstances arising subsequent to the entry of the former decree applies with equal force to the question of the finality of the decree of custody of a sister state made and entered in a divorce proceeding. It has been so held in the cases of In re Wenman, 33 Cal.App. 592, 165 P. 1024; In re Marshall, 100 Cal.App. 284, 279 P. 834; In re Livingston, 108 Cal.App. 716, 292 P. 285, 286; Titcomb v. Superior Court, 220 Cal. 34, 29 P.(2d) 206. The case of

In re Livingston, supra, quotes with approval from In re Marshall, supra, and says: "The quotation just set forth * * * indicates the rule generally prevailing that a decree of a court of one state, having jurisdiction, relating to the custody of minor children is under the doctrine of comity prevailing among sister states and, subject of course to the right of the parties to show a change in the circumstances or conditions, entitled to recognition in another state." This same case also quotes with approval from a case note appearing in 20 A.L.R. 815, where the authorities on the subject are collected, as follows: "'With some variation of statement, and an occasional intimation to the contrary, it is established by the great weight of authority that in the absence of fraud or want of jurisdiction, affecting its validity, a decree of divorce awarding the custody of a child of the marriage must be given full force and effect in other states as to the right to the custody of the child at the time and under the circumstances of its rendition; but that such a decree has no controlling effect in another state as to facts and conditions arising subsequently to the date of the decree; and the courts of the latter state may, in proper proceedings, award the custody otherwise upon proof of matters subsequent to the decree which justify the change in the interest of the child.'" See, also, note, 72 A.L.R. 442.

[4] The trial court in the instant case, by an express finding, indicated that it felt itself bound by the doctrine of comity to give recognition to the decree of the South Dakota court and that, in the absence of a change of circumstances and conditions affecting the welfare of the child, the decree of the South Dakota court was entitled to full faith and credit in this state. Having determined, after hearing all the evidence adduced by both parties, that there had been no change of conditions affecting the welfare of the child, the trial court in the instant case refused to modify the decree of custody of the South Dakota court, and refused to grant to appellant the sole and exclusive custody of the minor child in contravention of the decree of the South Dakota court. It is evident that in so doing the trial court was supported by ample authority.

[5] We do not wish to be understood as holding that "the change of circumstance" rule is an absolutely ironclad rule, and that there can be no possible exception to it. It is perhaps possible to conceive of a case in which, despite the fact that there was apparently no change of circumstances, nevertheless the welfare of the child might require that the previous order of custody be changed. Bogardus v. Bogardus, 102 Cal. App. 503, 283 P. 127. It is also possible to conceive of some theoretical case in which some fact, secret and hidden at the time of the entry of the former judgment, would in the interest of the welfare of the child justify a court in modifying the former order of custody despite the fact that there had been no actual change of circumstances since the entry of the former order. Under the authority of Olson v. Olson, supra, the court in such a situation would, we think, be justified in modifying the order. That this would be true is indicated by the language of Titcomb v. Superior Court, 220 Cal. 34, 39, 29 P.(2d) 206, 209, wherein it is said: "The paramount concern in awarding custody as between parents is the welfare of the child, who is not the property of his parents. If it appears that the circumstances upon which the prior order of another state is based has not changed, our courts, on principles of comity, may refuse to decree a change of custody, but the decree of the other state is never a bar to inquiry as to the best interests of the child." However, such a case would be a most unusual one. It is more speculative than real, and such a case is not presented by the facts of the instant case.

[6] The fact that the minor child of the parties was at the time of the entry of the South Dakota decree affecting his custody actually present in Arizona for his health under a permissive order of the court of South Dakota did not deprive the South Dakota court of jurisdiction to make a valid and effective decree affecting his custody which would in the absence of changed conditions, be effective in a sister state. A statement in the case of Warren v. Warren, 127 Cal.App. 231, 240, 15 P.(2d) 556, lifted from the text, might possibly seem to support the contention that the absence of a child from the state at the time of the entry of the decree deprives the court of jurisdiction to make an order affecting its custody. The statement must, of course, be considered in connection with the facts of that case, and the facts therein present a situation wholly dissimilar to the situation in the present case. In that case, the wife, who with her husband was a resident of

the state of California, went to Nevada for the sole purpose of securing a divorce, and the children, whose custody was awarded by the Nevada court to the wife, were never within the state of Nevada during the entire period of time. Obviously, the decree awarding the custody of the children to the wife was a nullity. In the instant case, as previously pointed out, both parties to the divorce action had been domiciled for several years prior to the commencement of the divorce action within the jurisdiction of the court where the divorce action was instituted, and were so domiciled at the time of the commencement of the action. The defendant in the action was personally served and both parties were personally present at the trial and within the state at the time of the entry of the decree. This being so, the South Dakota court had jurisdiction over the custody of the child, who was only temporarily absent from the state. State v. Rhoades, 29 Wash. 61, 69 P. 389; Anderson v. Anderson, 74 W.Va. 124, 81 S.E. 706. See, also, 2 So.Cal. L.Review, 302. It cannot, therefore, be successfully argued that the court of this state was at liberty to investigate the question of the custody of the child de novo by reason of the fact that the decree of South Dakota in so far as it concerned the custody of the minor child was void and ineffective.

[7, 8] An application for a modification of an award of custody is addressed to the sound legal discretion of the trial court, and its discretion will not be disturbed on appeal unless the record presents a clear case of an abuse of that discretion. Bancroft v. Bancroft, 178 Cal. 352, 173 P. 582; Dickerson v. Dickerson, 108 Cal. 351, 352, 41 P. 475; Baldwin v. Baldwin, 111 Cal. App. 148, 295 P. 93. An examination of the record in the instant case does not reveal an abuse of discretion on the part of the trial court, but demonstrates beyond a shadow of a doubt that this is merely a case of a conflict in the evidence. It is true appellant made a strong showing to the effect that Whitney was in fact suffering from chronic bronchitis, chronic ethmoid sinusitis, and asthma, and that his health would in all probability be improved by continued residence in the warm, mild climate of Southern California. This was, however, met by a strong countershowing on the part of the respondent that, aside from the asthma from which the child has suffered since infancy, the child has suffered only the usual complaints to which children in general are subject, such as colds and measles, and by evidence that the asthmatic condition was due to a sensitivity to certain proteins, pollens, and epidermals, which could be controlled as effectively in South Dakota as in Southern California. The appellant herself admits in her brief that there is a conflict in the evidence "on the question of the child's health, surroundings, care and general welfare." She attempts, however, to discredit the testimony of the witnesses in favor of the respondent's position by pointing out that they were probably motivated by self-interest, and were unworthy of belief. The credibility of witnesses is a question for the determination of the trial court. As was said in Baker v. Baker, 9 Cal.App. 737, 746, 100 P. 892, 897: "It * * * involves only a waste of time, to undertake to demonstrate to an appellate court, in a case in which there exists at least a substantial conflict in the evidence, that the testimony offered by the party against whom the findings have been made by the court below should be accepted in preference to that from which such findings have been deduced."

[9] We are satisfied from a careful examination of the record that the findings of the trial court to the effect "that said infant, Whitney Foster, is not now and never has been afflicted with chronic bronchitis or chronic ethmoid sinusitis," but now is, and since at least March 1, 1933, has been, a normal, healthy child, except that he is sensitive to certain proteins, pollens, and epidermals which bring about infrequent asthmatic attacks, wherever he has been, that during the time the said infant was in the custody of the respondent from on or about the 1st day of September, 1933, to on or about the 5th day of June, 1934, said Whitney Foster was in good health except for a hard cold, an attack of measles, and two asthmatic attacks, and that from on or about the 5th day of June, 1934, to the time of the trial of the action, during which time Whitney Foster was in the custody of appellant, he has suffered two attacks of cold and two asthmatic attacks, that any ailments from which Whitney Foster has suffered since on or about the 1st day of March, 1933 (the date of the divorce decree), were of a temporary and minor nature only, that there has been no change in any matters of a substantial or material nature affecting the welfare of said child since the making, entry, and filing of the South Dakota de-

cree, are supported by substantial evidence, and they in turn support the judgment.

The record shows that both foster parents are wealthy and are financially able to give to their adopted child all the material advantages which wealth can afford. It also shows that both parents are genuinely fond of the boy and interested in his welfare, and that both are willing to make personal sacrifices if his best interests require it. The evidence likewise shows that the boy is genuinely fond of both his parents and is happy in the company of each of them. The record also shows that the boy is a likeable, well-behaved child, and, except for the slight handicap due to the asthmatic condition, is a normal, healthy child. There is no doubt that in the custody of either of the parents he will receive intelligent care and training.

[10-12] We do not believe that the introduction in evidence in their entirety of exemplified copies of the judicial records of the South Dakota court pertaining to the divorce action between the parties was prejudicial error. Appellant insists that only that portion of the divorce decree actually awarding the custody of the child should have been admitted in this proceeding, and that the introduction of the findings of facts and conclusions of law, as well as an order served upon appellant at the time of the filing of the divorce complaint, restraining her from destroying furniture in the home of the parties, from running up bills at stores, and from removing Whitney from the jurisdiction of the South Dakota court, was intended solely for the purpose of prejudicing the trial court, and should not have been admitted in evidence. We cannot agree with this contention in so far as it applies to the findings of fact and conclusions of law of the South Dakota court. In order for the court to determine whether or not there had been any change of circumstances subsequent to the entry of the former decree, it was imperative that the court should understand the conditions as they existed at the time of the entry of the decree. The case of Crater v. Crater, 135 Cal. 633, 67 P. 1049, 1050, lays down as the proper rule for a trial court in considering a modification of a custody decree the following: "The court, in revising and modifying its decree, proceeds upon new facts considered in connection with the facts formerly established, the change of circumstances, the conduct of the parties, and the best interests of the child." See, also, Simmons v. Simmons, 22 Cal.App. 448, 452, 134 P. 791. It is obvious, we think, that this is the correct rule. In deciding a matter so vital to the parents and to the welfare of the child, it is important that the trial court in order to make as wise a decision as possible, should have as complete a picture of the whole background of the child as possible—the financial condition of the parents, their interests, their morals, and their dispositions, as well as any other factor which might aid the court in determining the probabilities of either parent furnishing a happy, harmonious home for the child. In a question involving so intimately human relationships, the trial court has a delicate as well as a difficult problem to solve, and it may be that, if some of the factors are missing, he may not arrive at the best solution. The facts established by the former decree are necessarily a part of such picture, and should be made known to the trial court. While it seems to us that no good purpose was served by the introduction of the restraining order, nevertheless, in view of the fact that this case was heard and decided by a judge, we are of the opinion that its introduction was not prejudicial as the trial judge undoubtedly gave to this evidence the slight weight it deserved.

[13] It is not necessary to discuss the question of whether or not Judge Keetch erred in refusing to disqualify Judge Smith, the trial judge who heard this case, for that question is moot. Appellant's motion, made under the provisions of section 170, Code of Civil Procedure (as amended by St.1933 p. 1828), at a time when there was considerable controversy over the issuance by the trial judge of the temporary custody order, prayed that Judge Smith be disqualified from passing upon any matter pertaining to the temporary custody of the minor child, Whitney Foster, or any other matter or proceeding whatever, except the making, signing and filing of findings of facts and conclusions of law and judgment herein. The trial judge, subsequent to said motion, did not find it necessary to pass upon any motions or take any action of any kind other than to sign and file the findings of facts and conclusions of law and judgment herein. This being so, the question

of whether or not the trial judge should have been disqualified from passing on intermediate orders is now wholly immaterial.

Under the law and the evidence presented in the instant case, the court was justified in refusing to make an order which would have the effect of modifying the decree of the South Dakota court.

The judgment is affirmed.

We concur: SHENK, J.; LANGDON, J.; SEAWELL, J.; THOMPSON, J.



9 Cal.2d 39

STEWART et al. v. HURT.
L. A. 16180.

Supreme Court of California.
May 27, 1937.

1. Appeal and error ⇐479(1)

Writ of supersedeas may issue only in aid of appellate jurisdiction but will be granted whenever it appears necessary that subject of action be maintained in status quo pending determination of appeal, its purpose being to preserve to appellant fruits of meritorious appeal where they might otherwise be lost to him.

2. Appeal and error ⇐479(1)

A showing that there is something for writ of supersedeas to act on is necessary to state adequate grounds for issuance of writ.

3. Appeal and error ⇐458(2)

A writ of supersedeas may issue only where judgment or order is such that it may be enforced pending appeal and, when judgment is rendered and no process is required to be issued for its enforcement, no supersedeas is allowed.

4. Appeal and error ⇐458(2)

A testamentary trustee against whom judgment was rendered removing him as trustee and appointing successor and requiring him to account de novo was not entitled to supersedeas pending appeal from judgment, since provision removing trustee and appointing successor was self-executing and provision accounting de novo was not order made in aid of judgment but was part of judgment.

5. Appeal and error ⇐458(1)

A "supersedeas" is a suspension of the power of a trial court to issue an execution on judgment appealed from, or, if writ of execution has issued, it is a prohibition emanating from court of appeal against execution of writ.

[Ed. Note.—For other definitions of "Supersedeas," see Words & Phrases.]

In Bank.

Suit by Ursul Stewart, now Ursual Stewart Mellor, and another, against Arthur C. Hurt, individually and as trustee under the will of Lucius J. Smith, deceased. Judgment for plaintiffs, and defendant appealed and filed a petition for a writ of supersedeas, and an order to show cause was issued thereon.

Order to show cause discharged, and petition for supersedeas denied.

Charles H. Brock and Arthur C. Hurt, both of Los Angeles, for petitioner.

Ralph G. Miller and Chester E. Cleveland, Jr., both of Los Angeles, for respondents.

EDMONDS, Justice.

The petitioner in this proceeding seeks a writ of supersedeas in connection with a judgment rendered against him as the trustee of a testamentary trust.

The will of Lucius J. Smith named the petitioner as executor and also trustee. He qualified as executor and conducted the administration of the decedent's estate. In the course of these proceedings certain property was distributed to him as the testamentary trustee. Thereafter beneficiaries of the trust commenced a suit in equity for his removal and also to set aside certain orders by which his actions as trustee were approved and his account settled and allowed. The trial court decided adversely to him. By the judgment he was removed as trustee and Ralph G. Miller was appointed as his successor. The court also vacated and set aside the order and decree settling and allowing the petitioner's first account as trustee and ordered an accounting de novo to be made covering the entire period of the trust. Other orders

made during the petitioner's administration of the trust were "declared null and void as against these plaintiffs."

It appears that this judgment was signed on November 9th although not entered until December 10, 1936. On December 11th the petitioner filed his notice of appeal from the judgment. The petitioner alleges that on December 9th the court made an order transferring the proceedings for an accounting de novo to the probate department and that notice was served upon him that the new accounting was set for hearing on December 30th. The petition for a writ of supersedeas was filed in this court the previous day and an order to show cause was issued thereon which directed the superior court not to hear or decide any proceedings brought for the enforcement of the judgment pending a further order.

However, the petitioner before making the present application complied with the judgment to the extent of turning over to Miller all of the personal property of the trust estate. He alleges he did this only because he was threatened with proceedings for contempt. Whatever the reason for his compliance the petitioner does not claim that any further proceedings may now be taken against him so far as requiring the delivery of property now in his possession.

As the grounds for a writ of supersedeas, the petitioner states that the plaintiffs and Miller intend to and will, during the pendency of the appeal, institute further proceedings in the superior court for the purpose of enforcing the judgment requiring him to account de novo and that the court will hear and pass upon his account. He also alleges that the writ should be granted because he has an equitable lien against the trust estate, and Miller, now purporting to act as trustee, may sell the property and defeat his claim. He represents that in the event of such a sale to an innocent purchaser, "there is a strong probability" title would pass free and clear of the equitable lien which he claims for money advanced to the trust estate.

[1-3] A writ of supersedeas may only issue in aid of appellate jurisdiction. Norton v. Municipal Court, 8 Cal.App.(2d) 368, 48 P.(2d) 124; Rosenfield v. Miller, 216 Cal. 560, 15 P.(2d) 161. Its purpose is to preserve to an appellant the fruits of a meritorious appeal where they might otherwise be lost to him. Whenever it appears necessary that the subject of the action be maintained in status quo pending the determination of the appeal, the writ will be granted. Dry Cleaners & Dyers Institute, etc., v. Reiss & Sterling Cleaners, Ltd., 5 Cal.(2d) 306, 54 P.(2d) 470. But to state adequate grounds for the issuance of the writ it must be shown that there is something for the writ to act upon. Only where the judgment or order is such that it may be enforced pending the appeal may the writ issue. Hulse v. Davis, 200 Cal. 316, 253 P. 136. "When the judgment is rendered, and no process is required to be issued for its enforcement, no supersedeas is allowed. In fact, there is no necessity for such a writ. There is nothing to stay or supersede." Tyler v. Presley, 72 Cal. 290, 13 P. 856, 857.

[4, 5] Those provisions of the judgment which removed the petitioner as trustee and appointed Miller to succeed him were self-executing. Dulin v. Pacific W. & C. Co., 98 Cal. 304, 33 P. 123. The provision requiring the petitioner to account de novo was not an order made in aid of the judgment; it is a part of the judgment. It contemplates a further proceeding; one in which the petitioner has full opportunity to appear and present an accounting in whatever form he chooses. There is, therefore, no basis for a writ of supersedeas. "A supersedeas, properly so called, is a suspension of the power of a trial court to issue an execution upon a judgment appealed from, or, if a writ of execution has issued, it is a prohibition emanating from a court of appeal against the execution of the writ." 23 Cal.Jur. 983.

If the superior court because of the appeal now has no jurisdiction to hear or determine an accounting de novo, the petitioner has an appropriate remedy. There is, however, no basis for the relief sought in the present application.

The order to show cause is discharged and the petition is denied.

We concur: LANGDON, J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.

9 Cal.2d 42

STREIFF et ux. v. DARLINGTON et ux.

S. F. 15653.

Supreme Court of California.

May 27, 1937.

Rehearing Denied June 24, 1937.

1. Mortgages ⇐375

Complaint, in action for deficiency on note secured by trust deed after application of proceeds of trustee's sale, *held* bad for uncertainty in not showing amount for which property was sold and amount unpaid after crediting such proceeds.

The complaint alleged that plaintiffs were payees of note for $20,000, secured by trust deed junior to trust deed securing third person's note for $23,000 to life insurance company; that defendants paid interest on their note, but defaulted in payment of principal and interest on third person's note; that foreclosure of prior trust deed being threatened, plaintiffs declared default by defendants and recorded due notice of default and plaintiffs' election to sell premises to satisfy such third person's obligation to insurance company; that property was thereafter sold by trustee; and that defendants paid no part of principal of note, except "net sum of $10,000" bid by plaintiffs "as the purchase price of said premises."

2. Mortgages ⇐372(2)

Purchasers of realty at sale under trust deed securing note payable to them acquired title free from all claims subordinate to such trust deed, but subject to all prior liens and titles.

3. Mortgages ⇐372(2)

Title passing by trustee's sale of realty under trust deed was subject to prior trust deed, which related back to recordation of junior trust deed.

4. Mortgages ⇐375

Mortgagees had no right to pay and charge to mortgagors amount secured by trust deed senior to that securing note payable to such mortgagees after trustee's sale of realty under junior trust deed, whether mortgagees purchased property thereat or not; it being trustee's duty to credit proceeds of sale after deducting advancements and expenses, whereupon makers became liable for difference between amount due as principal and interest on note and amount of such proceeds.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by William P. Streiff and wife against F. G. Darlington and wife. Judgment for defendants, and plaintiffs appeal.

Affirmed.

John H. Crabbe, of San Francisco, for appellants.

John Ralph Wilson, of San Francisco, for respondents.

EDMONDS, Justice.

The appellants, in a complaint to recover a deficiency upon a note originally secured by a deed of trust, pleaded facts which were challenged by a demurrer on both general and special grounds. The demurrer was sustained with leave to amend. Choosing to stand upon their complaint, the appellants continue to urge its sufficiency upon their appeal from the judgment against them subsequently entered.

[1] The complaint alleges these facts: Appellants were the payees of a note made by the respondents under date of July 20, 1929, for the principal sum of $20,000. This note was due two years after date and was secured by a deed of trust junior to a deed of trust to secure a note for $23,000 made by one Jose in favor of West Coast Life Insurance Company. The respondents paid the interest on their note in favor of appellants but defaulted in the payment of principal and interest on the Jose note. Foreclosure of the Jose deed of trust being threatened, the appellants "as the owners and holders of said promissory note, and of said trust deed securing the same, so executed by the said F. G. Darlington and Anna Darlington, his wife, declared that a default had been made, as aforesaid; and thereupon * * * recorded * * * due notice of defendants' default and breach, and of plaintiffs' election to sell the premises * * * in accordance with the terms of said trust deed so executed and delivered by said F. G. Darlington and Anna Darlington, his wife, to satisfy said obligations so executed and delivered by said Edward Jose to said West Coast Life Insurance Company." On June 29, 1931, following the notice of default and after notice of sale the property was sold by the trustee. No part of the principal of the note was paid by the respondents except "the net sum of $10,000.-

00" bid by the appellants "as the purchase price of said premises." On the back of the Darlington note appears an indorsement dated June 29, 1931, and signed by the trustee, which recites: "Received $10,000.00 net, and balance of $23,000.00 applied to pay first lien of West Coast Life Insurance Company, a corporation, total bid $33,000.-00 for whole property clear and free of all incumbrances." As an "addenda" to this indorsement there is the following signed by the trustee: "Balance due on this note is the sum of $10,000.00 plus accrued and unpaid interest, costs and expenses of this sale, plus accrued unpaid interest on West Coast Life Insurance Company first lien, plus costs and expenses accrued to date of redemption therefrom."

To this complaint the respondents interposed a demurrer on both general and special grounds. One of the special grounds specified is that the complaint is uncertain in that it does not appear therein nor can it be ascertained therefrom for what amount the property was sold. This point is well taken.

The appellants' complaint demands judgment for $43,615.30. A detailed statement of the amount claimed is pleaded in the complaint. It is alleged that on the date the action was instituted there was due and owing to the plaintiffs on the Darlington note a balance of $10,000 principal, which together with items of "interest accrued from August 1, 1931, to July 12, 1935," amounting to $3,040 and costs of sale bring the total to $13,329. On the Darlington trust deed $23,000 principal is claimed with "interest accrued from August 1, 1931, to July 12, 1935," $6,440, and other charges aggregating $846.30. But it is also alleged that the principal of the Jose note, $23,000, with certain interest and the additional amount of $846.24 for costs of sale and other items was paid to West Coast Life Insurance Company "on or about July 27, 1931." This date is subsequent to the sale of the property.

The complaint satisfactorily alleges that on December 1, 1930, the defendants had not made the payments required by the terms of the Jose note. It is also alleged that by the terms of the deed of trust made by the defendants they agreed "to pay all taxes, assessments and liens and all encumbrances now existing, or which may hereafter exist, or which may be imposed on the herein granted premises, or the debt secured, by state or other authority, and to protect said premises from sale therefor." The trust deed also provides: "If the grantor shall fail to pay at maturity any of the obligations or perform any of the covenants aforesaid, the lender, or his assigns, or the trustee, its successors or assigns, may, without notice to and at the cost of the grantor, pay and discharge all liens and encumbrances agreed to be paid and discharged by the grantor * * * and do all acts as they may deem best for the repair and protection of said premises. The lender and the trustee, its successors or assigns, are hereby authorized without notice to, at the cost of the grantor, * * * to purchase and settle any * * * liens, encumbrances or claims, and perform all other covenants herein agreed to be performed by the grantor."

[2, 3] These provisions gave the appellants so long as they were beneficiaries under the Darlington deed of trust the right to pay and discharge the Jose note and any proper charges which had accrued under the terms of the deed of trust securing it. However, the appellants paid the amounts due on the Jose obligation after the trustee under the Darlington deed of trust sold the property upon their demand. The complaint does not positively allege that the appellants became the purchasers of the property although it mentions the "net sum of $10,000. bid by these plaintiffs as the purchase price of said premises." Assuming the appellants to have been the purchasers at the sale, they acquired title to the real property free from all claims subordinate to their deed of trust but subject to all prior liens and titles. Carpenter v. Smallpage, 220 Cal. 129, 29 P.(2d) 841; 25 Cal. Jur. 98. Whoever was the purchaser, the title which passed by the sale was subject to the Jose deed of trust. It related back to the recordation of the deed of trust made by the respondents. Shafer v. Gregory, 102 Cal.App. 92, 282 P. 412.

[4] Upon the sale the Darlington deed of trust ceased to exist. San Mateo County Bank v. Dupret, 124 Cal.App. 395, 12 P. (2d) 669; 25 Cal.Jur. 94. The appellants whether they were the purchasers at the sale or not had no right to thereafter pay the amounts secured by the Jose deed of trust and charge the respondents therefor. It was the duty of the trustee to credit upon the note the proceeds of the sale after deducting any advancements, which had

theretofore been made pursuant to the provisions of the deed of trust and the expenses properly chargeable. The respondents then became liable for the difference between the amount then due as principal and interest on the note and the proceeds of the sale. Herbert Kraft Co. v. Bryan, 140 Cal. 73, 73 P. 745. What amount, if any, remained unpaid upon the note after such credit it is impossible to ascertain from the allegations of the complaint. The indorsements on the note indicate that the bid was not $10,000 as may be inferred from certain allegations of the complaint, but "$10,000. net," whatever that means, and a total bid of $33,000 is also mentioned.

The defendants were entitled to know with definiteness the amount of the deficiency claimed by the plaintiffs. Their special demurrer correctly challenged the insufficiency of the allegations of the complaint in this regard. The demurrer was properly sustained upon this ground. It is therefore unnecessary to consider the plea of the statute of limitations and the other points raised.

The judgment is affirmed.

We concur: LANGDON, J.; CURTIS, J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.



21 Cal.App.2d 154

In re ZEIGER'S ESTATE.

ZEIGER v. SILVERTON et al.

Civ. 11465.

District Court of Appeal, Second District, Division 2, California.

May 26, 1937.

Wills ⇐602(3)

Under will giving residue of estate to certain named nephews in "fee" and providing that if one nephew should die leaving no surviving children, such nephew's bequest was to go to certain others, portion of such nephew was to be distributed to alternative legatees and not to nephew's widow where nephew died after testator, leaving no surviving children, before distribution, since nephew did not receive an estate in fee simple (Civ.Code, § 1322).

Appeal from Superior Court, Los Angeles County; J. W. Mullin, Jr., Judge pro tempore.

Petition by Myron W. Silverton involving the construction of the will of Josie W. Zeiger, deceased, wherein Robert Leland Sheward and another were contestants and Bertille Zeiger and another were legatees. From a decree construing the will of deceased, Bertille Zeiger appeals.

Affirmed.

William Kay Crawford, of Los Angeles, for appellant.

Hunsaker, Moote & Longcroft and Lloyd E. Keiser, all of Los Angeles, for respondents Robert Leland Sheward and Norman T. Sheward.

CRAIL, Presiding Justice.

This case was transferred by the Supreme Court to this court for decision along with several other probate cases. In the trial court Commissioner J. W. Mullin, Jr., who is one of the assistant judges in the probate court of Los Angeles county, presided as judge pro tempore. The appeal is from a decree construing the will of the testator.

The part of the will to be construed when boiled down reads as follows: "I hereby give in fee to my nephews, Louis Zeiger, Robert Sheward and Norman Sheward, the residue of my estate, provided that if said Louis Zeiger should die leaving no children surviving him then in that event, his said bequest shall go in equal proportions to [others]." Louis Zeiger died after the death of the testator but before the distribution of the estate, leaving no children surviving him. The decree from which the appeal is taken distributed his portion to those persons named as devisees in case he died childless.

The sole question necessary for determination is: Should the Louis Zeiger portion have been distributed to the widow of Louis Zeiger? If so, the judgment should be reversed; if not, it should be affirmed.

Appellant contends that the first part of the sentence which we have quoted from the will shows a clear and distinct intention to give to Louis Zeiger an estate in fee simple, and that this devise cannot be cut down unless there later appears in the will an intention expressed in equally clear and distinct words to cut it down, citing

Civil Code, § 1322 and Smith v. Wood, 217 Cal. 541, 544, 20 P.(2d) 48.

The defect in the appellant's point is that in order to get the so-called clear and distinct intention to give an estate in fee simple it is necessary for him to strike down his sentence in the middle and use only the first portion of it, ignoring that part of it which qualifies the portion upon which he relies. Such violence does not lend itself to a fair and reasonable construction of the will. The very sentence upon which the appellant relies for an unqualified estate in fee contains language making the devise provisional, i. e., "provided that if said Louis Zeiger should die leaving no children surviving him then, in that event, his said bequest shall go" to others. The language of the sentence is clear and distinct enough, especially that part of it which says that the devise to Louis Zeiger is provisional. There is in the will no unqualified devise in fee to Louis Zeiger—no unqualified devise to him in fee at all. The decision is controlled by In re Estate of Briggs, 186 Cal. 351, 199 P. 322, and In re Estate of Carothers, 161 Cal. 588, 119 P. 926.

Judgment affirmed.

I concur: McCOMB, J.



21 Cal.App.2d 173

DOERR v. CIVIL SERVICE COMMISSION et al.

Civ. 10333.

District Court of Appeal, First District, Division 1, California.

May 27, 1937.

1. Municipal corporations ⇐218(2)

The civil service commission could not change its certification of person for appointment as jailer in exercise of power given it by new city and county charter, effective after his appointment by sheriff, to classify such position as temporary, seasonal, or permanent (Charter of City and County of San Francisco, § 148).

2. Municipal corporations ⇐218(2)

Position of one appointed as jailer by sheriff, pursuant to civil service commission's certification of his eligibility for temporary appointment, before effective date of new city and county charter, authorizing commission to classify such position as temporary, seasonal, or permanent, *held* permanent, though commission determined when he was again appointed after such date on assumption of expiration of first appointment that position was temporary; second appointment being nullity (Charter of City and County of San Francisco, §§ 142, 148).

Appeal from Superior Court, San Francisco County; Daniel C. Deasy, Judge.

Action by George F. Doerr against the Civil Service Commission of the City and County of San Francisco and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

John J. O'Toole, City Atty., and Thomas P. Slevin, Deputy City Atty., both of San Francisco, for appellants.

Joseph T. Curley and Marvin C. Hix, both of San Francisco, for respondent.

GRAY, Justice pro tem.

The City and County of San Francisco, its Civil Service Commission, and its sheriff appeal from a judgment determining that George F. Doerr had been appointed to a permanent position of jailor; that his discharge by the sheriff upon the commission's claim that the position was temporary was wrongful; and that he was entitled to reinstatement in such position. The parties agree as to the facts shown by the evidence, but differ as to the duration of the position established by such facts. Respondent argues that the evidence relative to the manner of his appointment and the continuous occupancy of the position of jailor is so similar to that in the case of McGillicuddy v. Civil Service Commission, 133 Cal.App. 782, 24 P.(2d) 942, as to require affirmation of the judgment upon its holding that an appointment similarly made to the position of similar duration was permanent. Appellants concede the existence of such similarity in the facts, but attempt to distinguish the cited case from the present one upon the contention that here, but not in the cited case, the commission, under section 148 of the new charter, was authorized to determine the temporary, seasonal, or permanent character of the position.

Eleven days before the effective date of the new charter, the commission, in response to the sheriff's request for the certification of the person standing highest upon the register of eligibles for appointment to the position of jailor, of which the tenure stated was temporary, certified respondent as eligible for appointment as jailor for temporary employment. On the same day the sheriff appointed him as jailor for temporary employment. Section 10 of article XIII of the old charter, then in effect, provided, as is aptly stated in the McGillicuddy opinion, for two types of appointment, to wit, a regular appointment from an eligible list, which became complete after satisfactory service during a probationary period, whose length the commission by rule could fix at not exceeding six months, and a temporary appointment, when no eligible list existed, which was to continue not exceeding sixty days and only until a regular appointment could be made. Rule 33 of the commission read as follows: "All positions which are expected by the appointing power to exist for a period of six months or over shall be considered, for the purposes of the rules of this commission, as permanent positions. All other positions shall be considered as temporary positions, and appointments to temporary positions shall automatically expire at the end of four months. The probable period of employment must be specified by the appointing power in its requisition." On the assumption that the appointment was temporary and expired in four months, the sheriff again appointed respondent to the position upon a similar certification made in response to a similar requisition. Respondent occupied the position continuously for seven months before he was discharged upon the ground that his temporary appointment had expired. During the succeeding twenty-eight and a half months, various other persons filled the position with the exception of three periods of twenty-four, thirty-eight, and seventy-four days each, during which time a jailor was not needed.

[1, 2] The requisition, certification, and appointment in this case were in the same form as those considered in the McGillicuddy Case. In both cases the appointee was discharged, after the new charter went into effect and after he had served in excess of the probationary period of six months, upon the commission's claim that his right to hold the position as a temporary employee had expired. The continuous service of respondent and others in the position of jailor for three years, under the test applied in the McGillicuddy Case, supports the finding that such position was permanent. Upon these facts the judgment is in accord with the McGillicuddy decision. But a difference between the two cases arises from the fact that the new charter was in effect at the time of respondent's second appointment and during all but eleven days of his service. If the commission had the power to classify the position under section 148 of the new charter, which it did not possess under its rule 33, the McGillicuddy decision is not controlling.

The pertinent part of section 148 reads as follows: "From the requisition of the appointing officer or otherwise, the commission shall determine whether the position is, in character, temporary, seasonal or permanent, and shall notify the candidate in accordance therewith to the end that the candidate may have knowledge of the probable duration of employment." At the time of respondent's first appointment the new charter had not yet become effective and therefore the commission did not then possess the power granted by the section. The commission could not change its certification after his appointment. Lazenby v. Municipal Civil Service Comm., 116 App.Div. 135, 101 N.Y.S. 5; Tiernan v. Cincinnati, 18 Ohio N.P.(N.S.) 145. Under the decision in the McGillicuddy Case his appointment was to a permanent position of jailor. His civil service rights then acquired were preserved by section 142 of the new charter. While the commission, at the time of his second appointment, was authorized to determine the character of the position, its determination then that it was temporary was immaterial unless the second appointment was essential to his title to the position. However, as he had already been regularly appointed to a permanent position, the second appointment was a nullity. Since the facts are essentially the same as those involved in the McGillicuddy Case, the decision in that case is determinative of the issues raised by those facts. Upon the authority of that decision the judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

21 Cal.App.2d 271

McGUSHIN v. ARNOLD.

Civ. 5825.

District Court of Appeal, Third District, California.

June 4, 1937.

1. Estoppel ⇐107

A party should plead facts showing equitable estoppel, to inform adverse party of nature of action or defense he must meet.

2. Pleading ⇐236(3)

In action for breach of patentee's contract to permit sale of patented article for royalties, wherein defendant alleged nonpayment of royalties, refusal to permit trial amendment of complaint alleging express temporary waiver of payment to allege estoppel to terminate contract for nonpayment was discretionary, where no excuse was offered for failure to amend earlier.

3. Appeal and error ⇐173(9)

In action for breach of patentee's contract to permit sale of patented article for royalties, wherein defendant alleged nonpayment of royalties and argument was made and evidence introduced under complaint alleging express temporary waiver of payment, plaintiff could not rely for first time in appeal brief on defendant's estoppel to terminate contract for nonpayment.

4. Estoppel ⇐90(1)

Under contract permitting sale of patented article for monthly payment of royalties to patentee, patentee was not estopped to terminate contract for nonpayment of royalties because he failed summarily to terminate contract when royalties were not punctually paid and did not cancel contract until he had not received royalties for six months.

5. Estoppel ⇐52

Estoppel in pais will be enforced in exceptional cases in interest of equity and good conscience.

6. Patents ⇐214

Where contractor falsely represented to patentee that he had financial means and ability, on entering contract to pay royalties monthly on penalty of cancellation of contract for right to sell patented article, became insolvent, neglected business, and collected royalties, but failed to account to patentee for six months, and patentee did not waive payment of royalties and was not estopped to terminate contract, patentee could terminate contract and sell patented article without accounting to contractor.

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Action by Joseph F. McGushin against John W. Arnold, wherein defendant filed an answer containing allegations by way of cross-complaint, and a separate cross-complaint. From a judgment for defendant, plaintiff appeals.

Affirmed.

Hatfield, Wood, Perry & Maddux and Richard H. Fuidge, all of San Francisco, Gilford G. Rowland and Wilson Craven, both of Sacramento, for appellant.

Fred A. Watkins, of San Francisco, for respondent.

PER CURIAM.

Respondent Arnold is the inventor and patentee of a lubricator. In 1934 Arnold entered into an agreement with plaintiff and appellant McGushin, wherein it was provided, among other things, that the appellant should pay to respondent a stipulated royalty on each article manufactured and sold, payments to be made on the 10th day of each calendar month, and that appellant should keep accurate accounts and render a full statement to respondent on or before the 10th day of each calendar month for the preceding calendar month showing all goods manufactured and sold under said license. Any improvements in the patent were to become the property of respondent, and if royalties or any part thereof should at any time be in arrears beyond the thirty days after the same shall become due, or if appellant should default in performing any of the conditions contained in the agreement, respondent could rescind the agreement.

Differences arose between the parties to this agreement, and an action was brought by plaintiff against defendant, alleging the execution of the agreement, and that in reliance thereon plaintiff expended large sums of money for the construction, promotion and sales of said lubricator. It was also alleged plaintiff constituted defendant his agent for the manufacture and sale of said lubricators for a limited period, and under that agreement defendant manufactured and sold certain lubricators, the ex-

act amount of which was unknown to plaintiff, but alleged that it exceeded the sum of $1,500. It is also alleged that defendant refused to make any accounting to plaintiff for the lubricators manufactured and sold.

It is also alleged in a separate cause of action that by reason of the premises plaintiff had been unable to continue the manufacture and sale of said lubricators, and had been deprived of profits therefrom. It is also alleged that plaintiff was damaged in the sum of $25,000 for the loss of business reputation.

An answer was interposed, denying the allegations of this complaint, and by way of cross-complaint, defendant alleged that plaintiff became and still was indebted to him in a specified amount in excess of $1,000 for royalty payments arising out of the sale of the lubricators by plaintiff under the agreement entered into in June, 1934.

It is also alleged in a separate cross-complaint that plaintiff became and still is indebted to defendant in a specified sum in excess of $300 for moneys paid out for the use and benefit of the plaintiff at his special instance and request in payment and discharge of obligations and indebtedness incurred by plaintiff.

Upon the trial, judgment was entered by the court in favor of defendant upon his cross-complaint, and it was found, among other things, that in June, 1934, plaintiff and defendant entered into a written agreement and that plaintiff failed and neglected to make the royalty payments as required by the agreement. The court also found that plaintiff, in violation of said agreement, failed and neglected to keep accurate or any accounts or to render a full or any statement in writing to defendant, showing goods manufactured and sold under said license agreement.

The court also found that it was provided in the agreement that after June 11, 1935, plaintiff was required to sell not less than 100 lubricators per month; that the agreement could be canceled for failure to sell said minimum quantity of lubricators; and that if royalties were in arrears for 30 days after the same became due or if plaintiff should make default in performing any of the terms of the license agreement, it was lawful for the defendant by notice in writing given to plaintiff, to terminate said agreement. The court then found that defendant duly canceled said agreement, and at that time and prior thereto, plaintiff was insolvent, and had failed to make royalty payments for a period of six months, and failed to make payments on the 10th day of each calendar month, or at all, and had failed and refused to keep accurate or any accounts or to render any statement of the same to defendant showing goods manufactured by him, under the agreement. The court then proceeded to make findings contrary to the allegations in the complaint, and as conclusions therefrom, directed that plaintiff take nothing by reason of his complaint, and that defendant as cross-complainant have judgment against plaintiff canceling and rescinding the license agreement of June, 1934. From this judgment plaintiff appeals.

In the complaint plaintiff alleges an express agreement on the part of defendant to defer payment of royalties until the business was in a good operating condition. In his brief, however, he directs his argument to the proposition that defendant was estopped from summarily terminating the contract for nonpayment of royalties. It is admitted that plaintiff did not plead an estoppel; however, he contends that the case was tried upon the theory that waiver was an issue and that in spite of the fact that it was not pleaded, waiver or estoppel in pais was in reality the chief issue in the case.

[1] Cases are numerous to the effect that the party relying upon an equitable estoppel should plead that fact in order that the adverse party may be informed of the nature of the action or defense which he will be obligated to meet. Holzer v. Read, 216 Cal. 119, 13 P.(2d) 697; Fair Oaks Bank v. Johnson, 198 Cal. 196, 244 P. 335.

[2, 3] An examination of the transcript shows that when plaintiff, during the trial, attempted to amend his pleadings to set up waiver or estoppel, the motion was denied. The complaint at that time set up a written agreement, and there was no intimation in the pleadings suggesting any defense of waiver. At the time the motion to amend was denied, no showing was made as to why such motion had not been presented earlier. We cannot say that under such circumstances the court abused its discretion in refusing an amendment during the course of the trial. Johnson v. Johnson, 134 Cal.App. 460, 25 P.(2d) 538; Hind v. Oriental Products Co., 195 Cal. 655, 235 P. 438; Scholle v. Finnell, 167 Cal. 90, 138 P. 746. It is true that during the trial questions were asked and answers given re-

lating to the dealings of appellant and respondent. These questions were permitted, however, in accordance with the theory of the complaint that an express oral waiver of payment had been made. Such testimony was proper to determine the understanding of the parties on this subject. Contrary to the theory of estoppel now urged, counsel for appellant, in his opening statement, declared that he intended to prove that the parties had expressly agreed amongst themselves that no royalties would be paid by the licensee to the patentee until such time as the business should be in a good going condition, and that there were royalties unpaid but not due. The record also shows that defendant frequently made demand of plaintiff to pay the accounts and asked for a statement of the amounts unpaid.

[4] There is nothing in the record which would bear out the contention of appellant that respondent had said or done anything to induce plaintiff to change his position in regard to the entire matter. We cannot believe that because Arnold did not summarily terminate the agreement when royalties were not punctually paid he thereby estopped himself from declaring a forfeiture. The situation here is not analogous to the case where sales contracts with instalment payments fall in arrears. Here appellant had manufactured and sold lubricators, collected the purchase price thereof, and withheld from respondent his portion representing royalties due under the contract.

[5] Estoppel in pais will be enforced in exceptional cases in the interest of equity and good conscience (Slade v. County of Butte, 14 Cal.App. 453, 112 P. 485), but we do not find sufficient facts to justify the application of that rule here.

[6] The finding by the court that payments or royalties were not waived or deferred is directly supported in the record by the testimony of respondent, as was also the finding of the court that appellant was insolvent, which was a ground specified in the agreement for the termination thereof. There is also ample support in the testimony that appellant failed to submit monthly statements, which also was ground for revoking the license.

Appellant contends that no adequate accounting has been had between the parties, but upon conflicting evidence the court found that appellant was indebted to respondent in the sum of $71. We must accept the findings of the trial court as being correct inasmuch as no evidence to the contrary is pointed out in the brief of appellant.

Appellant contends that a reading of the transcript will show that substantial justice had not been done between the parties by the trial court. We, however, cannot agree with that contention of appellant and believe that the trial court did reach a proper solution of the matter. It appears that appellant represented himself as a man of financial means and ability when he entered into the agreement to sell and manufacture the lubricators. It appears, however, that he lacked means, neglected the business, and was absent at long intervals from time to time. He collected royalties but refused to make an accounting thereof to the respondent, and owing to his inability and refusal to meet his accounts, was in trouble with Newman Machine Shop, who was manufacturing the lubricators.

We believe that under the circumstances the respondent was entirely justified in terminating the contract, and the court correct in so finding.

The judgment is affirmed.



21 Cal.App.2d 106

In re OLIVER'S ESTATE.

CARR v. CALIFORNIA FIRST NAT. BANK OF LONG BEACH.

Civ. 11464.

District Court of Appeal, Second District, Division 2, California.

May 20, 1937.

Hearing Denied by Supreme Court July 19, 1937.

1. Wills ⇐619

A will which made positive, certain, and unconditional legacy of $1,800 per year to testator's friend during her life, payable in monthly installments if possible, and bequeathed balance of income of trust fund to testator's brother, created annuity in favor of the friend (Probate Code, § 104).

2. Wills ⇐821(3)

Payment of annuity created by will which made positive, certain, and uncondi-

tional legacy of $1,800 per year to testator's friend during her life, but nowhere limited payments to income except as such intention of testator could be shown by inference and argument prohibited by statute, was authorized from corpus of trust estate established by will (Probate Code, § 104).

3. Appeal and error ⇐494

Where transcript did not contain copy of controverted order, and brief indicated disagreement as to what order trial court actually made, there was nothing before appellate court on which decision to determine effect or scope of order could be based.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Proceeding in the matter of the estate of Charles Henry Oliver, also known as C. H. Oliver, deceased, by Julia A. Carr, opposed by the California First National Bank of Long Beach, trustee. From an order denying her application, petitioner appeals.

Reversed.

W. D. McAlister and Harmel L. Pratt, both of Los Angeles, for appellant.

W. Ward Johnson, of Long Beach, for respondent.

WOOD, Justice.

The petitioner, Julia A. Carr, appeals from an order of the superior court denying her application for an order requiring respondent trustee to make payments from the corpus of the trust estate.

By the will of Charles Henry Oliver, who died February 18, 1929, a trust was created and the trustees were directed to convert all of the property into cash and reinvest it in securities that would net at least 6 per cent. In its sixth paragraph the will provided: "The Trustees are to collect and receive the income of said Trust Fund and pay the same over as it occurs and is collected to the Beneficiaries for whom it is set apart during their natural life of such Beneficiary." Subsequent paragraphs of the will provided: "Ninth—I give and bequeath to my friend Mrs. Julia A. Carr, residing at Pokeepsie, New York, the sum of Eighteen Hundred Dollars, per year during her life. The same to be paid in monthly installments if possible, at the rate of One Hundred and Fifty Dollars per month. Tenth—The balance of the income of said Trust Fund I give and bequeath to my brother George W. Oliver residing at Wyandanch, Long Island, New York, the same to be paid as it occurs and is collected. Eleventh—The Trust Fund must be kept in tact during the life of my brother, and my friend Mrs. Julia A. Carr, and the survivor is to receive the full income of said Trust Fund during his or her life. Twelfth—At the death of both my brother and Mrs. Julia A. Carr the estate is to be closed and settled and direct that the principal of said Trust Fund to be distributed as follows." At the time of the distribution, June 30, 1930, the estate was valued at $85,782.67. The trustee filed various accounts showing that the income of the estate was insufficient to pay to petitioner the sum of $1,800 per year. Upon the filing by the trustee of its third annual account, the court made an order that the costs and expenses of managing the trust should be paid out of the corpus of the estate. The trustee appealed from this order, which was affirmed by this court. In re Estate of Oliver, 10 Cal.App(2d) 336, 51 P.(2d) 1118, 1119.

[1, 2] In affirming the order just mentioned, this court said: "Mrs. Carr does not appeal, and her rights, if any, to an additional order are not before us for review. * * * Paragraph nine of the will creates an annuity in favor of Mrs. Carr. * * * The trustee cites no authority which holds that expenses of administration of a trust may not be paid from the corpus of a trust where the decree of distribution creates an annuity; and we know of none. We are not referring, of course, to cases where the will expressly provides that periodical payments shall be made from the income." The opinion on the former appeal was before the court at the hearing of the present petition. The order of the trial court denying the petition contained the following: "In the opinion in that case the appellate court, by way of discussion, assumed that the provision in favor of Mrs. Carr was an annuity. But as that matter was not before the court the accuracy of the assumption was not given the test and consideration it no doubt would have been given had it been made an issue." Whether the question concerning the nature of Mrs. Carr's legacy was before the court on the former appeal need not now be decided since we are satisfied with the statement made in the former opinion that the will creates an annuity

in favor of Mrs. Carr. As pointed out in the former opinion, the bequest to Mrs. Carr is positive and certain and without condition. No provision is contained in the will whereby payments are limited to income. Section 104 of the Probate Code is in point: "A clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will, or by an inaccurate recital of or reference to its contents in another part of the will." Respondent argues that an examination of the entire will shows that it was the intention of the testator that payments to Mrs. Carr be made from income only. In doing so, he resorts to "inference" and "argument," a procedure which is prohibited by the section just quoted.

[3] Respondent contends that the order made by the trial court upon the filing of the trustee's third annual account has finally disposed of the claim of Mrs. Carr to have the amount of her annuity paid from the corpus of the estate. According to the statements in the briefs, a wide disagreement exists between the respective counsel as to what order was actually made. The transcript does not contain a copy of the order. There is nothing before us upon which a decision on this point can be made.

The order is reversed.

We concur: CRAIL, P. J.; McCOMB, J.



In re MARTENS' ESTATE. *

TRAIN et al. v. SHERER.

Civ.S.C. 54.

District Court of Appeal, Second District, Division 1, California.

June 4, 1937.

Hearing Granted by Supreme Court Aug. 2, 1937.

1. Wills ⇐189

Where testator ordered that name of executor be stricken from will and another substituted, and signed memorandum of will acknowledging alteration, and signature was witnessed by another, testator attempted to execute "codicil," and not revocation, altered paragraph was ineffective, under statute, for want of due authentication, and will would be executed as originally written, under doctrine of "dependent relative revocation" (Probate Code, § 74).

[Ed. Note.—For other definitions of "Codicil" and "Dependent Relative Revocation," see Words & Phrases.]

2. Wills ⇐99

A "codicil" is some addition to or qualification of a last will and testament.

3. Wills ⇐189

The doctrine of "dependent relative revocation" is that, where will or portions thereof are canceled or mutilated to change will, and attempt fails, effort to revoke will be treated as relative and dependent on efficacy of new disposition, and hence original will remains in force.

HOUSER, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Proceeding by Henry E. Sherer for the probate of the will of John D. Martens, wherein Pearl E. Train and another filed written opposition and contest and sought appointment as administrators with the will annexed. From an order for petitioner, named contestant appeals.

Affirmed.

Marshall & Farnham, of Long Beach, for appellant.

Ben A. Hill, of San Pedro, for respondent.

YORK, Justice.

The contestants herein are the daughter and son, respectively, and the only heirs at law of John D. Martens, who died on or about the 4th day of April, 1936, leaving a last will and testament dated October 17, 1929, by which he devised and bequeathed his entire estate to the said son and daughter in equal parts. The only portion of the will with which we are concerned upon this appeal is paragraph "Fifth," which has reference to the appointment of an executor of the will. Originally, the paragraph read: "Fifth: I hereby appoint and nominate Sylvester Rocco of San Pedro, California, as Executor of this my Last Will and Testament, and in the event he cannot or does not

*For subsequent opinion see 74 P.2d 238.

act as such executor, then and in that event, I nominate Henry E. Sherer of San Pedro, California, as executor in his place and stead."

It appears from the record that the will was placed in the custody of the Bank of San Pedro, with which institution Rocco & Sherer were associated, and there remained until some time in March, 1933, when the testator secured it and thereafter had it in his possession. The evidence shows that on May 10, 1933, the testator, in the presence of his daughter, Pearl E. Train, her husband, Lew B. Train, and their son, Frank Martens Train, requested Lew B. Train to draw a line, using a typewriter, through the words: "Sylvester Rocco of San Pedro" and "in the event he cannot or does not act as such executor, then and in that event, I nominate Henry E. Sherer of San Pedro, California, as executor in his place and stead." After some general conversation as to whom should be named as executor, testator requested that the names "Pearl E. Train and Arthur R. Martens" be inserted in said paragraph "Fifth"; that testator then directed Lew B. Train to write at the bottom of the will the following: "Article No. 5 above was changed at my request and ordered changed by myself on this ten day of May, 1933." Whereupon, testator signed his name to said memorandum, and Lew B. Train witnessed such signature.

On April 6, 1936, contestants filed their petition for probate of the will and for their appointment as executors thereof; a few days later, respondent, Sherer, filed a second petition for probate asking that letters testamentary be issued to him, setting forth in his petition that Sylvester Rocco had declined to act as executor and had filed his waiver to that effect. Contestants then filed their written opposition and contest to the second petition for probate, and by a separate petition sought appointment as administrators with the will annexed. The matter came on for hearing in due course, and after hearing the evidence, the court admitted the will to probate and granted letters testamentary to respondent, Sherer. This appeal is prosecuted from that order by one of the contestants, Pearl E. Train.

Appellant maintains that the alteration of paragraph fifth amounts to a revocation of that particular paragraph, which leaves the will without an executor, and thus entitles appellant to the granting of her petition for appointment as administratrix with the will annexed. Respondent, on the other hand, contends that the alteration constitutes an attempted codicil to the will, which fails because it was not executed with the due formality of a will.

This matter comes to us upon an engrossed bill of exceptions, which shows, in addition to the testimony of the witnesses Pearl E. Train, Lew B. Train, and Frank Martens Train, that one E. D. Whitney testified that during the summer of 1933 the testator told him he had lost all confidence in Henry E. Sherer and that he (the testator) would not permit Sherer to handle his business under any condition. One Gladys Garrison, when called as a witness, testified that the testator had referred to Mr. Sherer as a scoundrel.

Appellant, in support of her contention, cites In re Estate of Wikman, 148 Cal. 642, 84 P. 212, and section 74 of the Probate Code.

Said section provides as follows: "Except as hereinabove provided, no written will, nor any part thereof, can be revoked or altered otherwise than:

"(1) *Instrument executed with same formalities.* By a written will, or other writing of the testator, declaring such revocation or alteration, and executed with the same formalities required for the execution of a will; or,

"(2) *Destruction, proof of.* By being burnt, torn, canceled, defaced, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by some person in his presence and by his direction. If such act is done by any person other than the testator, the direction of the testator, and the fact of such injury or destruction, must be proved by two witnesses."

As will be noted, the statute above referred to provides for revocation of a will in whole or in part, and apparently acting upon that premise, the court in Re Wikman's Estate, supra, held that, where the evidence showed that the will was in the possession of the testator from the time of its execution until his death, and was found immediately thereafter among his effects in his trunk, and that the name of the person nominated by testator as executrix had been canceled by ink lines drawn through it, this was sufficient to warrant a finding that this portion of the will had been canceled with intent to revoke it, and the balance of the will was entitled to probate.

However, we are of the opinion that the cited case is not authority here, for the reason that the will in the cited case was an olographic will, and further that the testator there made no attempt to substitute the name of a new executrix in the place of the name which was canceled by drawing ink lines through it.

In his memorandum of opinion, the trial judge in this case stated: "Under the circumstances of the case it is apparent that the doctrine of relative revocation applies and that the modification was in effect an attempted codicil which failed for want of formal execution."

[1, 2] Because the testator apparently did not abandon the idea of naming an executor of his will, we are not convinced that he intended the alteration of paragraph fifth as a revocation, but are rather inclined to believe that he intended it as a codicil, i. e., "* * * some addition to or qualification of a last will and testament." In re Estate of Plumel, 151 Cal. 77, 80, 90 P. 192, 193, 121 Am.St.Rep. 100. As a codicil, the altered paragraph fails for want of due authentication, and we are of the opinion that the trial court was correct when he applied the doctrine of dependent relative revocation to the facts presented by the instant case.

[3] In an annotation appearing on page 1401 of 62 A.L.R. is the following statement:

"When a will, or portions thereof, are canceled or mutilated in order to change the will in whole or in part, and the attempt fails for want of due authentication, or other cause, this effort to revoke in whole or in part will be treated as relative and dependent upon the efficacy of the new disposition intended to be substituted; and hence, if the attempted disposition is inoperative, the revocation fails also, and the original will remains in force. This rule is styled the doctrine of dependent relative revocation. It is based upon the presumption that the testator performed the act of revocation with a view and for the purpose of making some other disposition of his property in place of that which was canceled, and that there is, therefore, no reason to suppose that he would have made the change if he had been aware that it would have been wholly futile, but that his wishes with regard to his property, as expressed in his original will, would have remained unchanged in the absence of any known and sufficient reason for changing them."

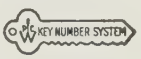
The order appealed from is affirmed.

I concur: DORAN, J.

HOUSER, Presiding Justice.

I dissent.

In re Estate of Streeton, 183 Cal. 284, 191 P. 16; In re Estate of Wikman, 148 Cal. 642, 84 P. 212; In re Estate of Olmsted, 122 Cal. 224, 54 P. 745; King v. Ponton, 82 Cal. 420, 22 P. 1087.



21 Cal.App.2d 217

REDEMEYER v. CARROLL et al.

Civ. 5831.

District Court of Appeal, Third District, California.

May 28, 1937.

Hearing Denied by Supreme Court July 26, 1937.

1. Easements ⇐36(3)

Evidence disclosing that plaintiff and his predecessors had used right of way from 1919 to commencement of action created presumptive knowledge in defendant landowner that use of land was under claim of right and sustained judgment quieting title to prescriptive right of way in plaintiff.

2. Easements ⇐8(1)

The fact that plaintiff was a successor in interest of one who at one time had grant of right of way of same course as that sought to be established by prescription did not serve to deny any rights that plaintiff acquired separate and apart from rights granted to his predecessors.

3. Easements ⇐36(1)

Where prescriptive right of way easement is claimed, burden of showing that taxes had been assessed on easement is on party contesting claim of adverse possession.

Appeal from Superior Court, Mendocino County; W. D. L. Held, Judge.

Action by Ernest L. Redemeyer against Harvey M. Carroll and others. From an adverse judgment, defendants appeal.

Affirmed.

Taft & Spurr, of Ukiah, for appellants.

Mannon & Brazier, of Ukiah, for respondent.

Mr. Justice PULLEN delivered the opinion of the court.

This action was brought to quiet title to a prescriptive right of way and to secure a perpetual injunction preventing defendants from interfering with the use thereof. Judgment was entered in favor of plaintiff, from which this appeal is taken.

The matter now comes before us upon a motion to dismiss the appeal or affirm the judgment. The motion to dismiss is denied, and we will consider the appeal upon its merits.

For many years plaintiff, by and through his predecessors in interest, owned a large tract of land, contiguous to the lands here involved. A county road leads from Laytonville to a quarter section corner of the lands belonging to defendant Nyhen. For more than forty years a road has existed from this point across the Nyhen lands to a point about midway between the end of the county road and the lands of Redemeyer. In 1918, by consent of the owners, a road was built by Sunset Trading & Land Company from the end of the existing way across the lands of the defendant Carroll and others to the Redemeyer boundary, for the purpose of getting out tanbark. A short time thereafter, one Larsen purchased the standing timber on the Redemeyer lands, to be removed within fifteen years, and secured permission to use the right of way, theretofore established by Sunset Trading & Land Company, across the lands of Wilson, predecessor of defendant Carroll, for the duration of the lease. Larsen and his successors used the road now claimed by plaintiff until the expiration of the timber lease.

It is conceded by defendants that plaintiff and his predecessors have continuously used this road from 1918 to the commencement of this action. It is the contention of appellants, however, that it does not appear that this continuous use was hostile or adverse to defendants, defendants claiming that plaintiff had a permissive use of the right of way by virtue of the right given to Larsen when the way was first opened.

The lands of plaintiff here involved were a part of a larger tract, and were used for the grazing of cattle and sheep. The road in question throughout its entire length is well defined and marked on the surface of the earth by tracks, ruts, and other indications plainly visible to the human eye. It had been used by plaintiff and his predecessors in taking their stock and other products from their lands to Laytonville, their shipping point, and bringing back to the ranch such articles as required, since it was first laid out. They drove their stock along this road and traveled over it on horses and by wagons, trucks and automobiles. Witnesses testified to having seen Redemeyer use the road during the various years from 1919 to the commencement of this action, and some had been employed by Redemeyer to repair the road and grade the same by means of tractors, graders, and teams. One witness, in 1925, assisted Redemeyer in rebuilding a bridge across the creek near the home of Carroll. No permission was asked of the owner, nor objection made by him to the use of the way by plaintiff or those preceding him.

[1] This created presumptive knowledge of the owner that the use was under a claim of right. It was held in Wells v. Dias, 57 Cal.App. 590, 207 P. 913, that where the use is continuous it creates a presumptive knowledge in the owner that the person using the land is doing so under a claim of right, and whether the use of the road is under a claim of right or a matter of neighborly accommodation is for the court to determine as a fact in the light of the relation between the parties and all the surrounding circumstances.

It will also be recalled that the original use granted to the third parties heretofore referred to was for the particular purpose of transporting lumber and tanbark, while the use of the road by plaintiff was of an entirely different nature, and was of itself notice to defendants of a claim to an independent right in plaintiff.

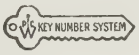
[2] The fact that plaintiff was a successor in interest of one who at one time had a grant of a right of way of the same course as that now sought to be established by prescription, does not serve to deny any rights that plaintiff may have acquired separate and apart from the rights granted to others. Bernstein v. Dodik, 129 Cal.App. 454, 18 P.(2d) 983; 19 Cor.Jur. p. 891.

[3] In regard to the payment of taxes, the trial judge correctly stated the rule

in passing upon that point as follows: "One line of cases holds that the claimant is required to show that there was no assessment of the property claimed adversely, or if assessed that the taxes were paid. Another line of cases holds that the burden rests on defendants to show that there was an assessment. It appears, however, that those cases which cast the burden upon the claimant involve title in fee, and not an easement. On the other hand, the law does not require an easement to be assessed. Silva v. Hawn, 10 Cal.App. 544, 102 P. 952. And the burden of showing that taxes have been assessed is upon the party contesting the claim of adverse possession. Monroe v. Pleasants, 41 Cal.App. 139, 182 P. 330, cited with approval in Los Angeles County v. Pacific Electric R. Co., 93 Cal.App. 512, 269 P. 767. The witness Purdy testified that there was no separate assessment of the right of way."

Finding no error in the judgment, the same is hereby affirmed.

We concur: THOMPSON, J.; PLUMMER, J.



21 Cal.App.2d 165

STOCKBURGER, Director of Finance, v. RILEY, as Controller.

Civ. 5843.

District Court of Appeal, Third District, California.

May 25, 1937.

Rehearing Denied June 22, 1937.

Hearing Denied by Supreme Court July 22, 1937.

1. States ⇐53

Under civil service amendment to Constitution, Legislature may provide for appointment to offices and positions in state service according to merit and fitness to be ascertained by competitive examinations, and for promotions in recognition of ability (Const. art. 24, adopted in 1934).

2. States ⇐90

The legal test whether service may be performed under independent contract or state civil service does not depend upon economy or efficiency (St.1913, p. 1035, as amended; Const. art. 24, adopted in 1934).

3. States ⇐53

Under civil service amendment to Constitution and Civil Service Act, it was the purpose to bring under civil service all services to be rendered to state except where specifically excepted (St.1913, p. 1035, as amended; Const. art. 24, adopted in 1934).

4. States ⇐90

The state had no authority to enter into contract wherein independent contractor agreed to furnish to state all labor and materials necessary to clean windows in state buildings in city of Sacramento, since services to be performed were not of excepted classes within Civil Service Act and civil service amendment to Constitution and was a type of service already performed by employees under civil service in other departments of state (St.1913, p. 1035, as amended; Const. art. 24, adopted in 1934).

Mandamus proceeding by Arlin E. Stockburger, as Director of the Department of Finance of the State of California, against Harry B. Riley, as Controller of the State of California.

Writ denied.

Webb Shadle, of Sacramento, for petitioner.

U. S. Webb, Atty. Gen., and Robert W. Harrison, Deputy Atty. Gen., for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Petitioner seeks, by this proceeding in mandamus, to compel the controller of the state to draw a warrant in payment of a claim for services rendered pursuant to an agreement entered into between the State of California and American Building Maintenance Company.

By this agreement the American Building Maintenance Company, called the contractor therein, agreed to furnish to the state all labor and materials necessary to clean the windows in certain of the state buildings in the city of Sacramento. The agreement specifies the several buildings, and fixes a schedule by which this work is to be done; it being so arranged that the work is continuous throughout the year, throughout every month in the year, though not on the same building each month. Compensation for this service is payable in monthly installments. It is also provided that the contractor is to indemnify the state for

any and all claims for losses resulting to persons employed in the work, or third persons who might be injured by the contractor in the performance of the agreement; it being understood that the contractor, in the performance of the agreement, is acting in an independent capacity, and not as an officer or employee or agent of the state.

A claim for services rendered pursuant to this agreement was presented to the controller, who refused to allow the same or to issue his warrant in payment thereof, asserting that such claim was not a legal charge against the state and was in violation of article 24 of the State Constitution, being the so-called civil service amendment adopted in 1934.

The question presented by this proceeding is whether article 24 of the Constitution includes and controls all service of the character described in the agreement here before us so as to require such services to be rendered by persons employed pursuant to the civil service provisions, or whether it is within the power of said officers and departments to contract individually for services of such character and without compliance with the civil service requirements.

The controller maintains that the services contracted to be rendered in the agreement is a service contemplated and required to be rendered to the state by employees of the state hired or appointed pursuant to the provisions of article 24 of the Constitution, a type of service heretofore and now rendered by regular employees of the state who are under the provisions of the state civil service, and that there were, at the time said agreement was entered into, persons upon the eligible list in the said state civil service who were and are capable of performing such services, but who were not hired or appointed to perform the same, and that said agreement was and is invalid and not a legal claim for payment of any claim against the state for services rendered thereunder.

The solution of this question is one of considerable difficulty; not all those performing services for the state are under civil service, the amendment itself specifically exempting some fourteen groups of officers and employees, and furthermore there still is recognized a field wherein the state may engage the services of one under special contract or agreement outside of civil service, as an independent contractor.

[1] It is undisputed that under article 24 of the Constitution the Legislature may provide for the appointment to offices and positions in the state service according to merit and fitness, to be ascertained by competitive examinations, and to grant promotions in recognition of ability.

Undoubtedly the execution of this agreement was entered into by the department because for some time the service here under consideration has been performed in the state offices in Sacramento by independent contractors, and such service has been efficiently and economically rendered, perhaps more so than under civil service, but that, however, is a matter with which neither the petitioner nor the courts are governed; such matter was for the people alone to have considered when they adopted the civil service amendment, and in view of the direct and emphatic expression of policy in the amendment, a definite design is apparent to embrace all classes of service within the state civil service system.

[2] Petitioner, however, recognizes that the legal test as to whether the service may be performed under an independent contract or state civil service, does not depend upon economy or efficiency, but takes the position that whenever a specific service can be performed under an independent contract, such contract should be executed, if greater economy and efficiency can be obtained thereby.

In the particular service provided in the agreement we are now considering, there is nothing urgent, temporary, or occasional in the work to be done. It requires no expert knowledge, experience, or ability that cannot be obtained from those either now in the employ or service of the state, or who cannot be brought into such service under the procedure provided by the Civil Service Act (St.1913, p. 1035, as amended).

When civil service was adopted, the people determined as a matter of policy that the provisions thereof applied to every officer and employee of the state except certain excepted classes, under no one of which the present character of services falls. All classes of service to the state are recognized wherein the work or labor to be performed is of that character with respect to which fitness thereof may be had by competitive examination, or as to which merit or efficiency may be developed or increased by continuous service or by promotion and recognition of demonstrated ability. The

type or character of such service is not confined to that wherein but a moderate degree of proficiency prevails, but embraces not only the less skilled types of labor, but also the most skillful types, including the various professions of engineering in all its fields, medicine, and law, and experts in the different vocations and occupations.

By section 1 of article 24 of the Constitution, it is provided: "Permanent appointment and promotion in the State civil service shall be made exclusively under a general system based upon merit, efficiency and fitness as ascertained by competitive examination." Section 3 of the amendment creates a state personnel board which is to administer and enforce the Civil Service Act (chapter 590, p. 1035, Stats.1913, as amended), and all other state civil service laws. In section 4(a) it is declared, "The provisions hereof shall apply to and the term 'State civil service' shall include, every officer and employee of this State except," and thereafter follow fourteen excepted classes of persons, under no one of which falls the present character of service. Immediately following these exceptions it is provided (subdivision (b) that the Legislature may, by law, apply the provisions of that article to those persons hereinbefore excepted, other than those mentioned in certain paragraphs, and except for those particular exceptions, the Legislature is powerless to make further exceptions.

In subdivision (c) of section 4, it is provided that whenever the appointment or employment of new or additional officers or employees is authorized, such officers or employees shall be subject to the provisions of the Civil Service Act unless of a class excepted therein. The amendment (section 5) further provides that all persons other than temporary appointees are to be continued in the service of the state without change of class or grade, and all temporary appointees, upon the adoption of the amendment, are to continue to hold their positions subject to the provisions of the act and for such a limited probationary term as the board might fix, and all other persons holding positions subject to the Civil Service Act for less than six months preceding the effective date of the amendment are deemed to hold their positions under temporary appointment. It is then provided by section 6 of the amendment, subdivision (a) thereof, that no temporary appointment of a person to any position shall be made unless there is no eligible list from which such position can be filled; and in subdivision (b), that no further temporary appointment shall be made to a given position after such a position has been filled by a temporary appointment for a period of six months; and in subdivision (c), no person shall hold a position under temporary appointment for a longer period than six months, and no person shall serve in the state civil service under temporary appointment for a longer total period than six months in any one calendar year. The State Civil Service Act, passed to make effective the constitutional amendment, provides that whenever the appointing power desires a service and has no one available to perform the same, the personnel board shall certify to the appointing power names from the eligible list for the class or grade to which the position belongs. If there is no eligible list from which the position may be filled, it is then provided that with the consent of the personnel board, such position may be filled by temporary appointment, and section 12 of the act (St. 1913, p. 1043, § 12, as amended by St. 1919, p. 1346) provides for emergency appointments. None of these requirements were, in the instant case, complied with, and it was for that reason the respondent controller refused to approve the claim or to draw his warrant in payment thereof.

Petitioner claims that the Civil Service Act and the constitutional amendment are limited to relationship of master and servant, and employer and employee, and do not prohibit independent contracts, and cites from foreign jurisdictions in support thereof.

The citation of authorities, however, from other jurisdictions do not greatly assist in the solution of this problem. This is a matter upon which the Legislature and the people of California had the right and power to speak, and having spoken, it is the duty of the courts to carry out their mandate as far as legally can be done.

[3, 4] It seems clear that under our constitutional amendment and Civil Service Act it was the purpose to bring under its provisions all services to be rendered to the state except where specifically excepted. The services here to be performed were not of the excepted classes, and we must hold that the appointing office was without authority to enter into an independent contract for the work to be performed.

In view of the inclusive provisions of the constitutional amendment and the Civil

Service Act, it is not reasonable to assume it was the intention that service of the character which had theretofore been performed for the state by state employees, and which employees were, by such amendment, included in and made a part of the civil service system, was thereafter to be the subject of independent contract. It is unreasonable that the same character of state service should be rendered by civil service employees in one part of the state, and be a subject of independent contract in another part of the state. If this agreement is valid there is nothing to prevent similar agreements from being made with relation to other janitor service, gardening, typing, and many other branches of service now accepted as subject to civil service. To sanction such an agreement would destroy the effectiveness of the enactment of the people in creating a Civil Service Act.

Having in mind therefore, that the work was continuous, rather than intermittent, permanent rather than temporary, general rather than special, not confidential in its nature, unskilled rather than highly technical, a type of service already performed by employees under civil service in other departments of the state, and having in mind the intent and purpose of the people in adopting the particular amendment under consideration, and that the sanctioning of such contract as here before us would have the result of weakening or destroying the effect of the civil service, we are constrained to hold that the writ should be denied. It is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.



21 Cal.App.2d 266

In re HARTMAN'S ESTATE.

HARTMAN v. FRIESNER.

Civ. S. C. 51.

District Court of Appeal, Second District, Division 1, California.

June 4, 1937.

Hearing Denied by Supreme Court Aug. 2, 1937.

1. Husband and wife ⇐55

The common-law rule regarding husband and wife as single entity and making wife subject to husband's will has been abandoned in California, and separate legal and civil existence of wife is recognized.

2. Wills ⇐116

A husband, under Civil Code, had no legal interest in property bequeathed to wife, and bequest was not void because husband was subscribing witness to will, under Probate Code (Probate Code, § 51; Civ.Code, §§ 157, 162).

3. Wills ⇐614(2)

Under will bequeathing to testatrix' husband life estate and to her niece remainder over after termination of life estate, husband was entitled only to income from property bequeathed.

4. Wills ⇐440

In interpreting will, only intent expressed in language of will prevails, and not probable intent which may have existed in mind of testator.

5. Trial ⇐388(2)

Contention that trial court erred in failing to make certain findings of fact would not be considered, where cause was submitted upon stipulated statement of facts contained in bill of exceptions.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Proceeding by William F. Hartman, administrator with the will annexed of the estate of Marian Post Hartman, against Jane Ashley Friesner. From a judgment adverse in part, petitioner appeals.

Affirmed.

P. E. Cavaney, of Los Angeles, for appellant.

Freston & Files and Sydney Wetzler, all of Los Angeles, for respondent.

YORK, Justice.

Pursuant to the provisions of section 1080 of the Probate Code, appellant, who is the administrator with the will annexed of the estate of Marian Post Hartman, deceased, petitioned the court as an heir at law and as a devisee and legatee under the last will of said deceased, for an order determining the interest or heirship of respondent in the property of said estate. Respondent filed her written statement setting forth her claim under the will of decedent. From a decree adjudging appellant entitled to an automobile and certain house-

hold effects, together with a life estate in income from personal property, and adjudging respondent to be entitled to a piano and to the corpus of the personal property upon termination of the life estate of appellant, this appeal is prosecuted.

The bill of exceptions contains a stipulated statement of facts, to the effect (after setting out the jurisdictional facts) that decedent died on January 8, 1934, leaving community personal property consisting of one Studebaker automobile and certain household furniture; and leaving certain separate personal property consisting of one Steinway piano, 170 shares of the common stock of the Eastman Kodak Company, and $472.42, the proceeds from the sale of shares of stock in the same company, which had been sold prior to the death of testatrix but had not been paid for until after her death; also a dividend from the 170 shares of said stock amounting to $127.50; that since the inventory was filed 20 shares of said stock had been sold by order of court to pay the expenses of administration of said estate; that all of the real property was held by deceased and her husband, William F. Hartman, the appellant herein, as joint tenants; that deceased left surviving her several brothers and sisters, to each of whom she left the sum of $1; the respondent herein, and the appellant; that decedent left a will executed and subscribed by two witnesses, one of whom was Samuel Robert Friesner, husband of respondent; that respondent was named in the will as executrix thereof, as well as a beneficiary thereunder.

The questions raised by appellant upon this appeal are as follows: (1) That a bequest to the spouse of a subscribing witness is void; (2) that under the fifth paragraph of the will appellant is entitled to the principal or corpus of the property bequeathed to him for life together with the right of consumption thereof.

The provisions of the will around which this contest revolves are as follows:

"Fifth: I give, devise and bequeath unto my beloved husband, William F. Hartman, in addition to the above, a life estate in and to my own separate property consisting of securities, or in and to my separate property that is now invested in securities, and I further devise, give and bequeath unto my beloved neice, Jane Ashley Friesner, the remainder over of all of my separate property after the termination of the life estate to my said husband.

"Sixth: I further give and devise to my beloved Neice, Jane Ashley Friesner, my Steinway piano."

In support of his first point, appellant claims that under section 51 of the Probate Code the husband of respondent "would be an interested person in his wife and in the estate of his wife upon her death"; and that neither spouse could qualify under that section "for the reason that they would not be 'disinterested witnesses.'"

Section 51, supra, provides: "All beneficial devises, bequests and legacies to a subscribing witness are void unless there are two other and disinterested subscribing witnesses to the will."

[1-2] Apparently appellant bases his contention on the common-law rule that regarded a husband and wife as a single entity and made the wife subject to the will of the husband. That theory has long since been abandoned in this state, where the present policy of the law is to recognize the separate legal and civil existence of the wife. Wilson v. Wilson, 36 Cal. 447, 454, 95 Am.Dec. 194, decided in 1868. The more recent case of O'Neill v. Williams, 127 Cal.App. 385, at page 388, 15 P (2d) 879, 880, holds: "The husband's common-law rights in the separate property of the wife have been changed by statute and in this state 'neither husband nor wife has any interest in the property of the other' except that 'neither can be excluded from the other's dwelling.' Civ. Code, § 157; 13 Cal.Jur. 818." Since the property acquired by respondent under the will is her separate property (section 162, Civ.Code), and her husband has no legal interest therein, it follows that she cannot be divested of her interest in such bequest by reason of the fact that her husband was a subscribing witness to the will.

In support of his second point, appellant urges that paragraph "Fifth" of the will, in order to carry out the intent of the testatrix, should read: "* * * the remainder over of the unused portion of all of my separate property after the termination of the life estate to my said husband." In other words, that when testatrix drew her will she "intended that her husband should have and enjoy the residue and money from the sale of the securities which she then owned and to use the money during his lifetime as he might choose to do, with the remainder over of the unused portion to go to her niece."

Said "Fifth" paragraph of the will was construed by the court as follows:

"It is further ordered, adjudged and decreed that Jane Ashley Friesner is entitled to receive as legatee and beneficiary under the will of Marian Post Hartman, deceased, subject to the right of William F. Hartman to solely receive the income therefrom during the period of his natural life, the following described cash and personal property belonging to the estate of said decedent and constituting the separate property of decedent, to-wit:

"(a) 150 shares of stock in Eastman Kodak Company;

"(b) The sum of $477.72, constituting the proceeds of six shares of stock in Eastman Kodak Company, sold by decedent prior to her death but paid for afterwards;

"(c) The cash received from the sale of 20 shares of stock in Eastman Kodak Company sold pursuant to order of this court heretofore made.

"It is further ordered, adjudged and decreed that William F. Hartman is entitled to receive solely the income from the personal property hereinbefore described in the preceding paragraph during the period of his natural life, but no part of the principal or corpus thereof whatsoever."

[3-4] The language of the will is clear and unambiguous; therefore, this court has no power to speculate as to the intention of the testatrix. In the case of In re Estate of Johnson, 107 Cal.App. 236, at page 242, 290 P. 314, 317, it is stated in a quotation from In re Estate of Hoytema, 180 Cal. 430, 181 P. 645: "'Only through speculation and conjecture may the construction contended for by appellants be confirmed. And this cannot be countenanced in view of the cardinal rule to the effect that in the interpretation of wills it is not the probable intent which may have existed in the mind of the testatrix which prevails, but only that which is expressed in the language of the will.' In re Estate of Blake, 157 Cal. 448, 108 P. 287."

[5] It is further contended by appellant that the trial court erred because of its failure to make certain findings of fact. As has already been noted herein, this cause was submitted upon a stipulated statement of facts; this being so, no finding thereon is necessary.

The judgment appealed from is affirmed.

We concur: HOUSER, P. J.; DORAN, J.

21 Cal.App.2d 253

VITALI et al. v. STRAIGHT et al.

Civ. 11235.

District Court of Appeal, Second District, Division 1, California.

June 2, 1937.

1. Automobiles ⇐168(1)

Though one may legally drive automobile at high speed, he does so at his peril and must have it under such control at all times that he may stop it if necessary to avoid injuring another user of highway.

2. Automobiles ⇐160(4)

A pedestrian crossing main thoroughfare at intersection without marked crosswalk must not only yield right of way to approaching automobile, but exercise due care at all times in his use of highway (St.1935, p. 188, § 562).

3. Automobiles ⇐217(2)

A pedestrian, failing to yield right of way to automobile and exercise due care in crossing main thoroughfare at intersection without marked crosswalk, was guilty of negligence proximately contributing to collision between him and such automobile, so as to preclude recovery of damages for his resulting death (St.1935, p. 188, § 562).

4. Appeal and error ⇐1170(9)

The giving of argumentative instructions so couched that jury might have been improperly impressed thereby at request of defendants in death action did not warrant reversal of judgment on verdict for defendants, in view of decedent's contributory negligence (Const. art. 6, § 4½).

5. Automobiles ⇐246(58)

Refusal of instructions on last clear chance doctrine in action for death of pedestrian struck by automobile, driver of which did not see decedent running diagonally across main highway nearly in center of intersection with his back toward automobile on dark night until automobile was within 40 to 45 feet from him, whereupon driver immediately sounded horn and applied brakes, was not error; such doctrine being inapplicable.

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

Action by Benedita Vitali and others against Ray H. Straight and another. From

a judgment for defendants and an order denying plaintiffs' motion for a new trial, plaintiffs appeal.

Judgment affirmed, and appeal from order denying motion for new trial dismissed.

L. V. Beaulieu, of Los Angeles, for appellants.

Nourse, Betts & Jones, of Los Angeles, for respondents.

HOUSER, Presiding Justice.

Plaintiffs appeal both from a judgment which was rendered on the return of a verdict in favor of defendants and from an order by which plaintiffs' motion for a new trial was denied. The action was brought by Benedita Vitali, both in her individual capacity and as guardian for her and her former husband's minor children, and by Mary Vitali, for damages which were alleged to have been sustained by them by reason of the wrongful death of Benedita Vitali's former husband, which resulted from a collision that occurred between him personally and an automobile that was operated by defendant Ray H. Straight. The accident occurred at night, at a point where a main thoroughfare was intersected on one side by one street and on the other side by two streets, neither of such intersecting streets being at a right angle with the main thoroughfare. The night was dark, but clear. A portion of the main thoroughfare was paved; and immediately preceding the happening of the accident, and until he was at a distance of from 40 to 45 feet from the point where the accident occurred, the said defendant was driving his automobile at a rate of speed estimated at from 40 to 45 miles per hour. The brakes, the horn, and the headlights of the automobile were "in good working order," and the headlights were lighted. Other than the defendants, no living person witnessed the happening of the accident. But, as was testified by defendant Ray H. Straight, although he could see "a half a mile," he did not see Vitali until his automobile was within 40 to 45 feet from him, at which time Vitali was running diagonally across the main highway, with his back turned partly toward the approaching automobile, and at a point nearly in the center of what might be termed the intersecting streets. Immediately upon discovering Vitali's position, the said defendant sounded the horn of the automobile, applied the brakes thereof, and "swerved" the automobile to the right. It skidded "something like thirty feet." The speed of the automobile was slowed, so that at the instant when the impact between it and Vitali took place the automobile was traveling at about the rate of from 20 to 25 miles per hour. From the time when the said defendant first saw Vitali until that when the collision occurred, the said defendant did not see the face of Vitali. In that regard, the said defendant testified as follows:

"At the point of collision he had his (Vitali's) back to me with his right hand out this way, I would say in this position (indicating).

"Q. Did you ever see the deceased's face, or any portion of his face? A. Before the accident, you mean?

"Q. Yes. A. I saw the back of his neck.

"Q. When did you see that? A. Just before we struck. * * * He seemed to increase his speed."

Said defendant also testified, in substance, that: "My lights were turned on for country driving. Vitali was running in rather an unbalanced condition, I would say, sort of sideways. It was hard to see, but it looked like he had something under his left arm or maybe in his left hand. After the collision occurred, one of the officers came up and found several pieces of glass on the highway, part of which was colored glass. It was curved. * * *"

[1-3] From a consideration of the foregoing situation, it would seem clear enough that defendant Ray H. Straight was guilty of negligence; but, even so, Vitali's negligence in the premises was equally apparent. Although, by the provisions of the governing statute, one may be permitted legally to drive an automobile at a high rate of speed, nevertheless, he does so at his peril, and at all times must have the automobile under such control in regard to speed that he may bring it to a stop, if necessary, in order to avoid injuring another who also is using the highway. On the other hand, the intersection where the accident occurred not having "a marked crosswalk," in crossing the main thoroughfare Vitali not only was obliged to "yield the right of way" to the automobile of defendant, but also at all times was required to exercise due care in his use of the highway. Section 562, Vehicle Code. (St.1935, p. 188). It is manifest that he made no effort to do either, and that his failure in that regard contributed proximately to the happening of the accident. Consequently, plaintiffs herein could recover no damages, however much they

and the minor children may have suffered by reason of the death of Vitali.

[4] Appellants direct attention to the fact that several of the instructions which at the request of defendants were given to the jury were objectionable, in that they were not only argumentative, but that in some respects they were so couched that the jury may have been improperly impressed by them. But, assuming that situation to be correct, the facts hereinbefore narrated are such that, had such specified errors not been committed, in any event the contributory negligence of Vitali would have precluded the rendition of a legal judgment in favor of plaintiffs. In such circumstances, the provisions of section 4½ of article 6 of the Constitution must be given application.

[5] Appellants also complain that, although so requested by plaintiffs, the trial court refused to give to the jury certain instructions which correctly stated the law with respect to the doctrine known as "the last clear chance." But, taking the facts of the case into consideration, this court is convinced that the law to which appellants refer has no proper application thereto, and consequently that no error was committed by the trial court in refusing plaintiffs' request.

The judgment is affirmed. The appeal from the order denying the motion for a new trial is dismissed.

We concur: YORK, J.; DORAN, J.



21 Cal.App.2d 156

NATIONAL AUTOMOBILE INS. CO v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

Civ. 5852.

District Court of Appeal, Third District, California.

May 25, 1937.

Insurance ⊂435

A workmen's compensation policy which was extended to include "water mains and connections" did not cover sewer construction, so as to render insurance carrier liable for injuries sustained by employee while engaged in sewer construction work, where insurance carrier did not know that employer was engaged on sewer job until after accident and insurance rate for sewer mains was almost double that of water mains.

Proceeding under the Workmen's Compensation Act by George Lehman, employee, opposed by C. R. Williamson and another, a copartnership, doing business as Williamson & Son, employer, National Automobile Insurance Company, insurance carrier, and others. To review an order of the Industrial Accident Commission of the State of California awarding compensation, the insurance carrier brings a writ of review.

Award annulled.

S. Norman Hays, of San Francisco, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Petitioner seeks, by this writ of review, to annul an order of the Industrial Accident Commission awarding compensation to George Lehman, for injuries sustained while working as a laborer for Williamson & Son, one of the respondents herein.

It appears from the evidence before the commission that Lehman sustained certain injuries while engaged in sewer construction work in the city of Sonora. The employer claimed to have been insured against liability by a policy issued by the National Automobile Insurance Company, petitioner herein.

It is the contention of petitioner that the particular policy of insurance issued by it to Williamson & Son, the employer, was so limited as to exclude the operations out of which this claim arose. After a hearing before the commission an award was filed based upon a finding that at the time of the injury to said employee, the National Automobile Insurance Company was the insurance carrier of respondent employer, and made an award against petitioner and in favor of the employee. From these findings and award this writ is sought.

It appears without conflict that the National Automobile Insurance Company, on December 19, 1935, issued a policy of work-

men's compensation insurance to Williamson & Son, a copartnership. This policy was in the standard approved form, and at the date of the issuance of the policy, Williamson & Son being engaged in such work in San Francisco, contained the following classification of operations: "6041—Grading land—excluding clearing of land, not canal or cellar excavation—quarrying, railroad or street or road construction. Payroll to include drivers, chauffeurs and their helpers.—Rate 5:35."

Thereafter on March 11, 1936, a further indorsement upon this policy was added in the following language: "Item 3—b—6319—Water Mains and Connections—construction work (excluding tunneling except at street crossings)—Rate—5.12."

The evidence shows that the employee, at the time of receiving his injuries, was doing labor work on a sewer line in the city of Sonora, Williamson & Son having undertaken to construct a sewer line as evidenced by a contract entered into between themselves and the city of Sonora.

To have been properly covered, such work would have required an additional classification of operation, viz.: "Code No. 6306—Sewer Construction—All operations—excluding tunneling, except at corners—rate 11.36." One of the members of Williamson & Son, a copartnership, testified that before undertaking the job at Sonora he called upon his insurance broker in regard to compensation insurance, and in particular whether or not his policy then in force with National Automobile Insurance Company would cover the particular type of work they were about to undertake. The broker testified that he referred the matter to a member of another brokerage firm and told them that Williamson & Son was going to put in a pipe line about 6,000 feet long at Sonora, the pipe line to be connected to a septic tank. The witness testified he told the broker that he had been informed that such pipe line would take the classification of "water mains." The witness, after receiving the policy, again called the broker and had the classification confirmed and then delivered the policy to Williamson & Son. A witness called upon behalf of the petitioner testified she was an underwriter for that company and had received an application for compensation insurance from the broker of Williamson & Son and received a request that a change by indorsement in the classification of operations under the policy be made to include "waters mains and connections," which was done. Neither the underwriter nor the insurance carrier knew until after the accident that the Sonora job was a sewer job.

Upon this evidence the commission found that the work engaged in by the employer was not excluded by the indorsement attached to the policy March 9, 1936. With this we cannot agree. There is no evidence in the record that there was a full disclosure to the National Automobile Insurance Company as to the character and type of material to be used or type of construction on this particular work, nor is there any evidence in the record that any agent of the insurance company was given the particulars or a true description of the work to be performed. In fact, the request for the extension of coverage asked for a rider on the policy to include "water mains and connections," and the insurance company did not know that the employer was engaged on a sewer job until after the accident.

Inasmuch as sewage is moved by gravity, it is necessary for sewer lines to be built on a uniform grade regardless of contour of surface of the ground, often necessitating a deep trench, and for that reason carries a much higher rate than does water pipe, for water in mains is propelled by force, and is not usually dependent upon gravity for flow, and therefore need not be placed in deep trenches and can establish its own grade regardless of the contour of the surface of the land. The rate for sewer mains is almost double that of the water mains, principally on that account.

The commission, in its order, attempted to construe the policy as meaning that water mains and connections included sewer construction, but we believe this would be extending the language of the policy to an unreasonable extent. In Pacific Coast Casualty Co. v. Industrial Accident Commission, 176 Cal. 24, 167 P. 539, the court was considering a policy of insurance which was limited to miners, hoistmen and timekeepers, and it was there held not to cover or include the superintendent. Also in National Automobile Insurance Co. v. Industrial Accident Commission, 220 Cal. 642, 32 P.(2d) 356, it was held that the classification of truckmen did not include the operator of a power shovel, although there

were similarities in the nature of the work involved.

For the foregoing reasons the findings and award of the Industrial Accident Commission should be annulled, and it is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.



21 Cal.App.2d 225

JACKIE COOGAN PRODUCTIONS, Inc., et al. v. INDUSTRIAL ACCIDENT COMMISSION.

Civ. 1857.

District Court of Appeal, Fourth District, California.

May 28, 1937.

Rehearing Denied June 24, 1937.

Hearing Denied by Supreme Court July 26, 1937.

1. Workmen's compensation ⇐1555

Evidence that death of foreman of ranch maintained by employer in part for entertainment purposes occurred in automobile accident on return from hunting trip supported finding that death arose out of and in the course of foreman's employment, notwithstanding foreman's presence on trip was suggested rather than ordered.

2. Workmen's compensation ⇐939

As respects liability of employer for an additional award under Workmen's Compensation Act because of "serious misconduct," "serious misconduct" on part of employer is conduct which employer either knew or ought to have known, if he had turned his mind to the matter, was conduct likely to jeopardize safety of his employee.

[Ed. Note.—For other definitions of "Serious Misconduct," see Words & Phrases.]

3. Workmen's compensation ⇐939

As respects liability of employer under Workmen's Compensation Act for an additional award, generally, driving an automobile at excessive speed is not in itself sufficient to establish "willful misconduct."

[Ed. Note.—For other definitions of "Willful Misconduct," see Words & Phrases.]

4. Workmen's compensation ⇐1674

Evidence that employer drove automobile in which employee was killed at speed of about 70 miles an hour over mountainous road, which was inherently and extremely dangerous under the conditions, sustained finding of "serious and willful misconduct" justifying an additional award of compensation against employer.

5. Workmen's compensation ⇐1723

In proceeding to annul compensation award, whether employer was guilty of "serious and willful misconduct" in driving automobile in which employee was killed at excessive speed over mountainous road so as to justify an additional award against employer was question of fact for determination of Industrial Accident Commission as a fact-finding body.

Proceeding under the Workmen's Compensation Act by Jackie Coogan Productions, Inc., and the Zurich General Accident & Liability Insurance Company, Limited, insurance carrier, to annul award of the Industrial Accident Commission in favor of Nora Jones, Effie Jones, and Charlie Jones, a minor, by Effie Jones, his guardian ad litem.

Award affirmed.

Charles J. Katz, Alfred Gitelson, and J. L. Kearney, all of Los Angeles, for petitioners.

Everett A. Corten, of San Francisco (Arthur I. Townsend, of San Francisco, of counsel), for respondent.

BARNARD, Presiding Justice.

Petitioners seek to have annulled awards of the Industrial Accident Commission in favor of the wife, mother, and son of one Charles Jones, who was killed in an automobile accident on May 4, 1935. The petitioning insurance company was the insurance carrier for Jackie Coogan Productions, Inc., a corporation, which will be herein referred to as the petitioner.

Charles Jones was employed by the petitioner on a ranch it owned in San Diego county near the Mexican border. On the day in question he accompanied John L. (Jackie) Coogan, John H. Coogan, his father, and two friends of the Coogans on a hunting trip to a point in Mexico about 25 miles from the ranch. The trip was made in an automobile owned by Jackie Coogan, personally, and driven by John H. Coogan.

While they were returning to the ranch an accident occurred which caused the death of four occupants of the car, including Jones. A proceeding before the respondent commission followed, with an award against the insurance carrier in the sum of $3,960.20 and an additional award against the petitioner based upon a finding that the injury was caused by serious and willful misconduct on the part of the employer.

It is here contended that the evidence is insufficient to support the finding that the injuries suffered by Charles Jones arose out of and in the course of his employment, and the further finding that these injuries were caused by the serious and willful misconduct of the employer.

With respect to the first point raised it appears that John H. Coogan was the president of the petitioner; that he and his wife owned all of the stock in that corporation with the exception of two qualifying shares; that the corporation had operated this ranch for a number of years and had never made a profit therefrom; that there was a guest house thereon which was referred to as a "lodge"; that John H. Coogan frequently brought friends to the ranch and entertained them there, particularly over week-ends; that on this particular occasion friends of Jackie Coogan were being entertained over the week-end; and that Jones, as foreman, was employed by the month and was supposed to work or to be subject to call twenty-four hours a day and seven days a week.

The widow of Charles Jones testified that on previous occasions she had heard John H. Coogan order her husband to go on hunting trips with him and that her husband always went pursuant to these instructions; that one of her husband's main duties was to help entertain guests brought to the ranch and to assist in providing comforts for them; that he saddled horses for the guests, cleaned the game secured by them, and assisted in cleaning and taking care of their guns before and after these hunting expeditions; that she had heard Jackie Coogan and his father discuss between themselves and with guests the fact that they would take her husband with them on hunting trips and that he would help clean the fowls and look after the guns; that when guests came to go on a trip or to spend a week-end on the ranch John H. Coogan would call her husband from whatever work he was doing and have him assist in the matter of making the guests comfortable; that several times her husband had told her that John H. Coogan wanted him to go on hunting trips into Mexico; that John H. Coogan usually told her when he was going to take her husband with him and on May 3, 1935, he told her that he was going to take her husband with him the next day; that on this occasion her husband told her that he did not want to go on this trip, as he wanted to finish building a fence around some grain so that the cattle would not get in; and that just before her husband left on the morning of May 4, he was working on this fence. The mother of Charles Jones testified that her son looked after the company that came to the ranch, took them milk and got firewood, and that John H. Coogan would just tell him they would go hunting on a certain day and that "they was always hunting a big part of the time."

Jackie Coogan testified, after saying that he had asked Jones to go on this trip about two weeks before May 4, "Well, it was my father and I, we asked him. We were both standing there together and my dad told him he had lined up a dove hunt at Oscar Denton's ranch, and so I asked Charlie, naturally, to go with us, and I brought some shells for him from Los Angeles." He further testified that Jones had frequently gone on hunting trips with him and with his father; that he would not think of going out hunting without asking Jones, if he was around where he could get hold of him, "because I liked his company and because he was a good shot"; that there were a lot of days when he could not get him as Jones was busy; and that "it is a different set-up. It wasn't like a strict employer and employee."

A Mr. Bernstein testified that he was general manager of the petitioner corporation; that John H. Coogan employed Jones in the first place; that John H. Coogan was the only one who would know what Jones' duties were; that the witness gave no orders to Jones except with reference to furnishing information for inventories and the like; that he did not know whether the trip in question was a pleasure trip or whether it was one in the course of Jones' employment; that during the shooting season they sent people down to the ranch; and that he knew that Jones had gone out on shooting expeditions "but I was never there at any time when they ever went off the ranch on a hunting trip." When asked if it was not Jones' duty to comply with any request made by Mr. Coogan he replied that Jones was foreman and would naturally comply with suggestions made by Mr. Coogan, and

that "I would do anything my boss asked me to."

[1] It is petitioner's contention that the trip on which Jones met his death had no connection with his duties as ranch foreman, that on this occasion he stepped aside from his employment and engaged in a trip for his own pleasure, and that in so doing he was accepting an invitation and not obeying instructions. The evidence justifies the inference that this ranch was maintained, in part at least, for entertainment purposes and that a large part of the duties imposed upon Jones related to this use of the ranch. It may fairly be inferred from the evidence that Jones, as a part of his employment, was expected to go on hunting expeditions of this nature, that the situation was thoroughly understood by both sides, and that the duty thus resting upon him was no less real because the direction to go on this particular occasion may have taken the form of a suggestion rather than that of a direct order. In our opinion, the finding that the injury suffered by Jones arose out of and in the course of his employment is fully supported by the evidence. Shafter Estate Co. v. I. A. C., 175 Cal. 522, 166 P. 24.

With reference to the finding of serious and willful misconduct on the part of the employer the evidence is as follows: The accident occurred at a point about 2 miles from the ranch, as the party was returning from this hunting trip. Jackie Coogan testified that for at least 10 miles before the point where the accident occurred the road over which they traveled is a regular mountain highway; that the accident happened on the last of three curves; that as they approached this last curve in the series of three, a car, coming in the opposite direction, forced them off the road; that they had gone around two of the curves and were negotiating the third curve when the crash came; that the third curve is a little sharper than the others and that as you start into the third curve you can see a distance of 100 feet ahead; that they were traveling on their right-hand side of the road; that just as they were coming to the crux of the third curve, at a speed of between 40 and 50 miles an hour, a car coming from the other direction shot around the point; that this other car was astraddle of the white line and was in the middle of the highway; and that the car driven by his father turned to the right, hit a soft shoulder, started to skid, skidded quite a ways before it left the road, and then went off the embankment and crashed into the rocks below.

A Mr. Pollack testified that a few minutes before the accident he was riding along this road in another car and that some 3 or 4 miles before the point of the accident the Coogan car passed them going in the same direction; that at that time the Coogan car was traveling at from 70 to 75 miles an hour; that there were many turns and grades in the road; that the siren or horn on the Coogan car was sounded continuously; that "it sounded like a police car or an ambulance"; that that car was being driven astraddle the center of the highway; and that he could see that car for 150 yards when it passed out of his sight around a turn in the road. Two other witnesses testified that the Coogan car passed where they were standing at a point about 2½ miles from the scene of the accident; that their attention was first attracted to the car by the sound of its "siren" or "whistle," which was sounded continuously; that at that time the car was traveling at from 70 to 75 miles an hour; that a few minutes later they went to the scene of the accident; that there were seven white posts alongside of the highway at the end to the last curve before the scene of the accident; that two or three of these white posts were broken off; that the tracks of the Coogan car were visible on the shoulder of the road for a distance of 100 to 125 feet; that these tracks led to where the posts were broken off and down to the wreck; and that the marks showed that the tires had skidded for all of this distance of 100 or 125 feet.

An occupant of the car which passed the Coogan car on the turn immediately before that car left the highway testified that she first saw the Coogan car about 20 or 30 feet ahead of her coming toward the car in which she was riding; that the Coogan car was traveling at a speed of 75 or 80 miles an hour; that the car in which she was riding stopped within 10 or 20 yards after the Coogan car passed when another occupant of her car called out that the Coogan car had gone over; and that she then looked back and saw a cloud of dust. Another occupant of that car testified that that car was on the right-hand side of the road as it passed the Coogan car and that the Coogan car was traveling about 70 miles an hour. A third occupant of that car testified that that car was traveling on its right-hand side of the road; that the Coogan car was traveling at about 70 miles an hour; that she looked back and saw the Coogan car leave the highway in a cloud of dust but did not see it light; that she spoke to the driver

of the car in which she was riding; and that that car was then turned around.

[2, 3] The definition of the term "wilful misconduct" and the general rules applicable in the determination of the question of whether such misconduct appears in a particular instance are well established. Meek v. Fowler, 3 Cal.(2d) 420, 45 P.(2d) 194. In Horst Co. v. Industrial Acc. Comm., 184 Cal. 180, 193 P. 105, 108, 16 A.L.R. 611, it was stated that serious misconduct on the part of an employer must be taken to mean "conduct which the employer either knew, or ought to have known, if he had turned his mind to the matter, to be conduct likely to jeopardize the safety of his employees." In applying these rules to a particular set of circumstances close questions are often presented. Generally speaking, we think it may be said that driving a motor car at an excessive speed is in itself not sufficient to establish willful misconduct. McLeod v. Dutton, 13 Cal.App.(2d) 545, 57 P.(2d) 189, McCann v. Hoffman (Cal.App.) 62 P.(2d) 401. It has, however, been held that excessive speed, taken in connection with other circumstances, was sufficient to show that the driver of a car knew or should have known that injury to others would probably result from his actions. In Walker v. Bacon, 132 Cal.App. 625, 23 P.(2d) 520, driving an automobile at a speed of 66 miles an hour over a high crowned road that was not smooth, when the driver knew the condition of the road and knew that his automobile had a badly worn steering knuckle, was held to justify the conclusion that the driver was guilty of willful misconduct. In Norton v. Puter, 138 Cal.App. 253, 32 P.(2d) 172, it was held that the defendant was guilty of willful misconduct in driving his automobile at a speed of 55 miles an hour on a wet pavement with his vision obscured by falling rain, when his windshield wiper was not operating, when he knew that he was approaching a dangerous curve in the highway where he had had previous close calls, and when he had been warned to diminish the speed of his car. In Candini v. Hiatt, 9 Cal.App.(2d) 679, 50 P.(2d) 843, a driver who had barely escaped an accident while driving around the first curve in a highway at the rate of 45 miles an hour, after being warned that he was driving too fast, and who, in disregard of a warning that he was approaching another dangerous curve, increased his speed to 50 miles an hour, with resulting injury to his passengers, was held to have been guilty of willful misconduct. In Medberry v. Olcovich, 15 Cal.App.(2d) 263, 59 P.(2d) 551, 553, 60 P.(2d) 281, the court said: "The question of whether the minor defendant was or was not guilty of willful misconduct is essentially one of fact for determination by the fact finder. Appellants extensively review many cases involving willful misconduct, calling our attention in their review that the facts in the instant case are similar to facts in some cases where judgment went for plaintiff, and that they are dissimilar to facts in other cases where defendant prevailed. It must be borne in mind, of course, that the interpretation to be given actions and conduct must turn on the circumstances of the individual case, and that decisions passing upon facts constituting, or failing to constitute, willful misconduct, can be of little assistance, other than to announce the definition of that term. It is our duty on appeal to indulge in all reasonable inferences to support the findings and judgment."

[4, 5] While the question before us is rather close, we think it is primarily one of fact and that the evidence in its entirety, with the reasonable inferences therefrom, is sufficient to sustain the finding of the commission. The point where the accident occurred was within 2 miles of this ranch. It appears from the evidence that John H. Coogan had taken a number of trips which necessarily took him over this route and he must have been familiar with the fact that it was a mountain road with many turns. It appears, without conflict, that he was driving at an excessive rate of speed at two points a few miles away from the scene of the accident and there is ample evidence that just before the accident happened he rounded a turn in the road where vision was limited to 100 feet at an excessive rate of speed. The evidence justifies the inference that his speed while rounding that turn was inherently and extremely dangerous under the conditions there existing and that he knew or should have known that injury to others was probable. Assuming that the evidence might have justified a different conclusion, we think it may not be held, as a matter of law, that this fact-finding body exceeded its jurisdiction in viewing the evidence, with its reasonable inferences, as disclosing serious and willful misconduct on the part of the driver of the car.

For the reasons given both awards are affirmed.

We concur: MARKS, J.; JENNINGS, J.

HENRIETTA et ux. v. EVANS et al.*

Civ. 11359.

District Court of Appeal, Second District, Division 2, California.

May 27, 1937.

Hearing Granted by Supreme Court July 26, 1937.

1. Appeal and error ⇐931(1)

An appellate court will view evidence most favorably to respondents.

2. Automobiles ⇐244(25)

Evidence sustained finding that automobile involved in collision was being driven with consent of owners, who were dealers, so as to render them liable, under statute imposing liability on owner whose automobile is being operated by another with his permission, for damages resulting from negligence of operator, where dealers, after receiving deposit, turned over automobile to agent of purchaser with instruction that purchaser should return immediately with automobile and sign conditional sales contract, and purchaser drove automobile to dealers' place of business, but, finding it closed, continued on to another town where collision occurred (Civ.Code, § 1714¼, now St.1935, p. 153, § 402).

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Vincent M. Henrietta and Clara M. Henrietta, husband and wife, against D. E. Evans, also known as Donald E. Evans, Elgin Smith, and others. From a judgment in favor of the plaintiffs, Elgin Smith and others appeal.

Affirmed.

Sarau & Thompson, of Riverside, Roy W. Colegate, of Los Angeles, and Frank L. Miller, of Banning, for appellants.

Reay, Scharf & Reay, of Los Angeles, for respondents.

McCOMB, Justice.

This is an appeal from a judgment in favor of plaintiffs after a trial before the court without a jury in an action to recover damages for injury to person and property.

[1] Viewing the evidence most favorable to respondents, the essential facts are these:

On January 5, 1933, in order to have appellants, who were engaged in the business of selling automobiles at Beaumont, Cal., hold a 1931 Ford tudor sedan for him, D. E. Evans deposited $5 with them. The price of the car was $325, $30 to be paid in cash and the balance at the rate of $25 per month. On January 20, 1933, Mr. Evans, being employed at Desert Center, Cal., and unable to leave, asked a fellow employee, Mr. Randall, to take $25 to appellants in Beaumont and bring the Ford to him at Desert Center.

Mr. Randall, in compliance with this request, went to appellants' place of business in Beaumont, made the $25 payment, and after some discussion appellant Obernolthe told Mr. Randall that he could take the Ford to Mr. Evans at Desert Center and to instruct Mr. Evans to return it immediately to Beaumont and sign the papers evidencing the conditional sales contract. He also gave him a receipt, which read, "By Cash on car cont." Mr. Randall took the automobile and early the following morning delivered it to Mr. Evans, together with the instructions received from appellant Obernolthe; whereupon Mr. Evans drove to Beaumont and finding appellants' place of business closed, continued to Colton, Cal., where he collided with an automobile in which plaintiffs were driving, injuries to plaintiff resulting.

[2] This is the sole question presented for determination:

Was there substantial evidence to support the court's finding that the Ford automobile at the time of the collision mentioned, supra, was being driven with the express permission of appellants?

This question must be answered in the affirmative. We have examined the record and are of the opinion there was substantial evidence considered in connection with such inferences as the trial court may have reasonably drawn therefrom to sustain the finding of fact mentioned above and each and every other material finding of fact upon which the judgment was necessarily predicated. We therefore refrain from further discussion of the evidence. Thatch v. Livingston, 13 Cal.App. (2d) 202, 56 P. (2d) 549; Koeberle v. Hotchkiss, 8 Cal. App.(2d) 634, 48 P.(2d) 104; Leavens v. Pinkham & McKevitt, 164 Cal. 242, 245, 128 P. 399.

Since the law is settled that the owner whose automobile is being operated by another with his permission is liable for damages resulting from the negligence of the

*For subsequent opinion see 75 P.2d 1051.

operator (section 1714¼, Civ.Code, now section 402, Vehicle Code [St.1935, p. 153]) the conclusion reached by the trial court is correct.

The judgment is affirmed.

I concur: CRAIL, P. J.



21 Cal.App.2d 100

KOHN v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 10448.

District Court of Appeal, First District, Division 1, California.

May 20, 1937.

Executors and administrators ⇐501

The superior court cannot permit payment of commissions to special administrators prior to issuance of general letters of administration notwithstanding there may be instances where special administrators are granted general powers or acting under such powers they have practically completed administration of a particular estate (Probate Code, §§ 467, 904).

Petition for certiorari by Marion H. Kohn against the Superior Court of the state of California, in and for the City and County of San Francisco, and the Honorable Frank H. Dunne, judge of Department No. 9 of such court.

Order sought to be reviewed annulled.

Pillsbury, Madison & Sutro, of San Francisco, for petitioner.

Theodore J. Roche, Sullivan, Roche & Johnson, Martin Minney, Jr., and Heller, Ehrman, White & McAuliffe, all of San Francisco, for respondents.

PER CURIAM.

A proceeding in certiorari. On August 8, 1934, special letters of administration in the matter of the Estate of George A. Kohn, Deceased, were issued by respondent. Neither letters testamentary nor general letters of administration were yet issued. On December 2, 1936, over objection respondent made its order allowing a sum on account of the commissions of the special administrators. Petitioner, who is beneficially interested in the estate, alleges that in so doing respondent acted without and in excess of its jurisdiction.

Section 467 of the Probate Code reads as follows: "The special administrator must render a verified account of his proceedings in like manner as other administrators are required to do. His commissions and the fees of his attorney shall be fixed by the court; but the total commissions paid and extra allowances made to the special administrator and executor, or to the special administrator and general administrator of an estate, must not, together, exceed the sums provided for in this code as commissions and extra allowances for the services of executors or administrators; and the total fees paid to the attorneys both of the special administrator and executor, or of the special administrator and general administrator, must not, together, exceed the sums provided in this code as compensation for the ordinary and extraordinary services of attorneys for executors or administrators." And section 904 of the same Code provides: "Any executor or administrator, at any time after six months from the issuance of letters testamentary or of administration, and upon such notice to the persons interested in the estate as the court or a judge thereof shall require, may apply to the court for an allowance upon his commissions; and on the hearing the court shall make an order allowing him such portion of his commissions, for services rendered up to that time, as the court shall deem proper, and the portion so allowed may be thereupon charged against the estate."

Section 467 is based on the former section 1417 of the Code of Civil Procedure, and section 904 upon former section 1616 of the Code of Civil Procedure. In re Estate of Boyer, 94 Cal.App. 206, 270 P. 1005, 1006, was an appeal from an order fixing the fees of a special administrator upon the rendition of his final account and before the expiration of the year following the admission of the will to probate. Said section 1616 contained a provision that "At any time after one year from the admission of a will to probate, or the granting of letters of administration, any executor, or administrator, may * * * apply to the

court for an allowance to himself upon his commissions." In view of this section it had been previously held in effect that such an allowance could not be made to special administrators or general administrators within the year. In re Estate of Jones, 166 Cal. 147, 135 P. 293; In re Estate of Piercy, 168 Cal. 750, 145 P. 88. It was contended in the Boyer Case that the expression "Any * * * administrator," contained in the section, did not apply to a special administrator, and that therefore the allowance within the year was proper. From its construction of these sections, the court concluded, however, that the Legislature intended the section to apply as well to special administrators, and that the provision restricting the power of the court with respect to the allowance of commissions should likewise apply; further, that in every case such an allowance could only be made after the issuance of letters of general administration.

Respondent urges that the latter conclusion was not necessary to the decision. Assuming the correctness of this contention, nevertheless the reasons given for such conclusion appear to us to be equally applicable to the present case. The court said: "As a special administrator's fees and those of an executor or general administrator must amount, when added together, to no more than the total allowable under section 1618, it is reasonable to suppose that the Legislature did not intend an allowance to a special administrator until a time when the court, in making the allowance, could determine, with some degree of accuracy, what should be the total apportionment of fees as between a special administrator and the executor or general administrator, as an aid to concluding what partial allowance should be made to the special administrator. It would appear that the Legislature determined that a sufficient time would elapse, for the purpose of making an intelligent solution of such a question, after the passage of one year."

Although respondent's arguments are not without force, we are satisfied that it was not the legislative intention to permit the payment of commissions prior to the issuance of general letters; nor is this view affected by the fact that there may be instances where special administrators are granted general powers, or it appears that, acting under such powers, they have, as here, practically completed the administration of a particular estate. Any other rule would be calculated to foster practices detrimental to orderly administration, to correct which there would be no remedy by appeal, and with no corresponding benefits to estates.

The order is annulled.

9 Cal.2d 21

SETHMAN v. BULKLEY et al.

S. F. 15358.

Supreme Court of California.

May 26, 1937.

Rehearing Denied June 24, 1937.

1. Evidence ⇐119(3)

A letter from a mother to her son bearing the same date on which the mother made transfers of property to daughters, and stating that she had arranged with the daughters to make certain payments to the son after her death, is admissible, under the res gestæ rule, as part of the transaction on the question whether such arrangement was made, in view of the statutory presumption that it is truly dated, though it was not delivered to the son before the mother's death (Code Civ.Proc. §§ 1850, 1963, subd. 23).

2. Appeal and error ⇐1011(1)

Where a mother contemporaneously with the making of transfers to her daughters wrote a son that she had arranged with the daughters to make payments to him after the mother's death, the daughters' denial that any such arrangement was made creates merely a conflict in the evidence as to which the trial court's conclusion is final on appeal.

3. Trusts ⇐44(2)

Where, contemporaneously with the execution of conveyances of real estate and the assignment of a mortgage by a mother to her daughters, they agreed to make payments to a son after the mother's death, a personal judgment against them and a judgment impressing a trust on the property received from the mother is proper.

4. Action ⇐65

Where daughters, in consideration of transfers of property by their mother, agreed to pay a son $500 and $25 per month, the amount recoverable in an action to enforce the contract and impress a trust on the property transferred to the daughters is governed by legal principles, notwithstanding the equitable features of the action, and judgment cannot be rendered for payments to accrue after the date of the trial.

THOMPSON, J., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by Charles J. Sethman against Alvina F. Bulkley and another. From a judgment for plaintiff, defendants appeal.

Modified and affirmed.

Prior opinion, 61 P.(2d) 765.

Rehearing denied; EDMONDS, J., dissenting.

G. H. Van Harvey and Harold E. Haven, both of San Francisco, for appellants.

Morris, Jaffa & Sumski, of San Francisco, for respondent.

CURTIS, Justice.

The principal question involved in this case is whether a letter written by the mother of the plaintiff stating that she had arranged with his two sisters, the defendants, to pay to him certain money upon her death, was admissible in evidence against the two sisters to show a promise on their part to pay to the brother said sums of money. The mother on February 18, 1926, executed and delivered two deeds in which she conveyed by one of said deeds the title to certain real property in San Francisco to one of the defendants and by the other she conveyed another piece of real property to the other defendant. On the same day, she executed and delivered an assignment of a mortgage to the two defendants. Upon her death there was found in her safe deposit box a letter, bearing date February 18, 1926, being the same date on which she executed the two deeds and the assignment of mortgage to the plaintiff's sisters, in which the mother stated that she had arranged with them that they should pay to him on her death the sum of $500, and certain monthly payments of $25. There was further evidence that the mother on January 10th in the following year was taken by the defendant Mrs. Bulkley to the attorney of the latter for the purpose of making her will. Mrs. Sethman, the mother, showed the attorney the letter of February 18, 1926, and directed the attorney to incorporate in her will a bequest to her son of the same character as that stated in her letter. Referring to this bequest, the will provides: "This gift and bequest to my son is also made in accordance with the terms of that certain letter dated, San Francisco, California, February 18, 1926, directed to my said son and signed by me as his loving mother, Cathrina Sethman, which said gift and bequest and said letter in no sense provide for separate payments, but constitute solely one and the same payment, said gift and bequest being limited by the terms hereof and of said letter." The will was prepared

as directed and executed by her. The attorney asked her at the time if any money had been paid over to her daughters for that purpose, and she replied that she paid nothing over to them for that purpose. The attorney at the same time prepared a deed of gift which was executed and delivered by Mrs. Sethman to her daughters whereby she conveyed to her two daughters as joint tenants all her real and personal property. Thereafter Mrs. Sethman executed and delivered to her two daughters various other assignments of mortgages and trust deeds, six in number. She died on the 9th day of April, 1932, and left property which was appraised at only $445. The defendants testified that they never had any agreement or arrangement with their mother that they would pay any sum of money to the plaintiff, and that their mother never informed them that she had written the letter of February 18, 1926, nor did they have any knowledge of the existence of said letter until it was found after her death in the safe deposit box. The plaintiff also testified that he had no knowledge of said letter until after his mother's death, and that his mother never spoke to him regarding said letter. The trial court found the mother had, prior to her death, made certain transfers of real and personal property to the defendants, upon the promise by defendants that they would pay to the plaintiff the several sums of money mentioned in said letter of February 18, 1926, and rendered judgment in favor of the plaintiff for the sum of $500, and for all said monthly payments that had accrued up to the day of trial, and also for all monthly payments which might accrue in the future by virtue of the defendants' promise to their mother. The judgment further gave to plaintiff a lien to secure these payments upon the property conveyed to defendants by the mother. The defendants have appealed from this judgment.

The principal contention of the defendants on this appeal is that the evidence is insufficient to support the finding of the trial court that the mother had prior to her death made said transfers of real and personal property to the defendants upon their promise to pay to the plaintiff the sums of money mentioned in said letter. This contention rests for support mainly upon the alleged error of the trial court in admitting in evidence the letter of February 18, 1926. If said letter was properly admitted in evidence—which the defendants do not concede—it is contended by the plaintiff that it furnishes ample evidence to support the findings of the court in the respect just mentioned.

[1-3] As we have seen, the letter and three transfers of property by the mother to her two daughters bore the same date. It is presumed that a writing is truly dated. Subdivision 23, § 1963, Code Civ.Proc. There is no evidence in this case to overthrow this presumption. The uncontradicted evidence, therefore, in this case is that the mother wrote this letter, in which she stated that she had arranged with her daughters to make the payments called for in the letter, at the date on which she conveyed to her two daughters the two pieces of real property and assigned to them a mortgage given to secure a promissory note in a substantial amount. From these proven facts, the trial court drew the inference that said letter was written and said transfers of property were made as one transaction, and that the letter was admissible to show the true intent and purpose of the parties involved therein. As a part of the same transaction, the letter was admissible under the res gestæ rule which, as stated in section 1850, Code of Civil Procedure, is as follows: "Where, also, the declaration, act, or omission forms a part of a transaction, which is itself the fact in dispute, or evidence of that fact, such declaration, act or omission is evidence, as part of the transaction." The fact in dispute in this action is whether the mother arranged with her daughters that upon her death they would pay to their brother certain sums of money. The letter expressly states that such an arrangement had been made by her with her daughters. It was, therefore, evidence of the fact in dispute, and was admissible for the purpose of proving that fact. It is true that the letter was not delivered, and was left by the mother in her safe deposit box, where it was found in a sealed envelope with her will immediately after her death. The fact that the letter was not delivered before the death of the writer did not destroy its admissibility as part of the res gestæ or render it insufficient as proof of the statements therein contained. Rogers v. Manhattan Life Ins. Co., 138 Cal. 285, 71 P. 348. With this evidence properly admitted in evidence, the least that can be said in favor of the defendants' contention that there is a lack of evidentiary support of the findings is that the evidence as a whole upon the issue involved is in conflict, and that the trial court's

conclusion is final upon appeal. Defendants lay great stress upon their evidence and that they never had any understanding or arrangement or agreement with their mother to pay their brother anything and upon the testimony of the attorney who drew their mother's will that she told him that no arrangements had been made with her daughters to pay their brother. This evidence was all before the trial judge, and evidently it did not sufficiently impress him of its truthfulness to cause him to find for the defendants. If the defendants agreed with their mother to make the payments called for in the letter, then a personal judgment against them is proper. The judgment impressing a trust upon the property received by defendants from their mother under the conditions which were shown to exist between the mother and daughter was proper. Smith v. Lombard, 201 Cal. 518, 527, 258 P. 55; Cooney v. Glynn, 157 Cal. 583, 108 P. 506.

[4] However, we are of the opinion that the decree in this case goes beyond the legal limits when it purports to give judgment in favor of the plaintiff for monthly payments which were to accrue after the date of the trial. It is true that there are equitable features in this action in so far as it involves the issues as to whether a trust should be imposed upon defendants' property to secure the payment of the amounts found to be due from defendants, but, when determining these amounts, we must resort to the agreement which was found to have been made between the defendants and their mother, and the issue thus made was purely legal and must be governed by legal principles. The right of a plaintiff to recover future installments due under a contract, that is, payments to become due after the conclusion of the trial, was before this court in the case of Brix v. People's Mutual Life Ins. Co., 2 Cal.(2d) 446, 41 P.(2d) 537. It was there held that, in an action for the recovery under a contract calling for monthly payments, the judgment must be limited to those installments due up to the date on which the trial was concluded, and that it was error for the trial court to include in its judgment installments which were to become due after that date. That case has been followed in Cobb v. Pacific Mutual Life Ins. Co., 4 Cal.(2d) 565, 571, 51 P.(2d) 84, and Reuter v. Pacific Mutual Life Ins. Co., 5 Cal.App.(2d) 333, 337, 43 P.(2d) 576. Further answering plaintiff's contention that the rule against recovery of future installments while applicable to actions at law does not govern suits in equity, we might demonstrate the fallacy of this argument by the following illustration: In an action on a promissory note, payable in installments, without any acceleration clause therein, recovery on said note could only be had for the installments due at the date of trial, or at most at the time judgment was entered. If this same note were secured by a mortgage, and a suit in equity were brought to foreclose the mortgage, we do not apprehend that any one would contend that the plaintiff in such equitable proceeding could recover on said note any installment payments beyond those recoverable in an action at law on the note alone. It will, therefore, be necessary to modify the judgment by striking therefrom that portion thereof which provides for the recovery of the monthly installments falling due after July 9, 1934, the date of the judgment being July 18, 1934. This modification of the judgment will not affect that portion thereof which gives to the plaintiff a lien upon the property described in said judgment as security for the payment of all monthly installments of $25 each, which may become due to the plaintiff in the future under the agreement between the defendants and their mother as stated in said letter of February 18, 1926.

The judgment is therefore modified by striking therefrom that portion thereof which purports to award payment for the recovery of monthly installment payments to become due after July 9, 1934, and as so modified the judgment is affirmed.

We concur: SHENK, J.; SEAWELL, J.; LANGDON, J.

THOMPSON, Justice (dissenting).

I dissent. The letter involved demonstrates its inadmissibility. In order to come within the res gestæ rule, the statement or declaration must have been made under circumstances precluding the idea of deliberation or premeditation; it must have been made without opportunity to deliberately concoct a false statement. The contents of this letter purport to be not a spontaneous declaration, but a narrative of past events, a statement of something which had already happened. The letter reads:

"I have arranged with your sisters Alvina and Louise to have them pay you the

sum of Five Hundred Dollars ($500.00) immediately after my death, and thereafter the sum of Twenty-Five Dollars ($25.00) monthly for a period of One Hundred and Sixty (160) months. Should you pass away before such time, all payments are to cease.

"Should your present wife die before said monthly payments have all been paid you, they will pay you immediately in a lump sum the balance remaining."

In Williams v. Southern Pacific Co., 133 Cal. 550, 555, 65 P. 1100, 1102, we find this language: "If spontaneous and caused by the event, they may nearly always be shown. But if afterwards, no matter how shortly afterwards, there is an attempt to explain what has happened, or to account for it, or to defend one's self, or the like, it is incompetent and inadmissible as res gestæ. A narrative, even if given during the occurrence, is inadmissible. Heckle v. Southern Pacific Co., 123 Cal. 441, 56 P. 56. There the declaration attempted to be shown was made by the injured person while under the car wheels. This court remarked that the occurrence had not been ended, and yet, if it should appear that the remark was a narration of what had occurred rather than a spontaneous expression, and outgrowth of the occurrence, it was not competent. See, also, Lissak v. Crocker Estate Co., 119 Cal. 442, 51 P. 688; 1 Greenl. Ev. § 113." Other statements might be quoted because the authorities are legion to the effect that the narration or recital of past events cannot be admitted under the theory that it is a part of the res gestæ. In fact, there is an unanimity of opinion in the cases to the point.



ENTREMONT et al. v. WHITSELL et al., Railroad Commission. *

S. F. 15772.

Supreme Court of California.

May 26, 1937.

Rehearing Granted June 24, 1937.

1. Automobiles ⇐59

Activity under agreement between highway common carrier and Department of Public Works, whereby carrier was to furnish, at an hourly rate, trucks, drivers, gasoline, oil, and other materials necessary for operation of trucks, carry compensation insurance on drivers, and assume responsibility for damages from operation of trucks, was "transportation of property by motor vehicles" within meaning of Highway Carriers' Act, and within regulatory powers of Railroad Commission, rather than "renting of motor vehicles" (Gen.Laws Supp.1935, Act 5129a, and Act 8220, §§ 136, 136.5; Civ. Code, §§ 1925, 1955).

The "renting of motor vehicles" normally consists of furnishing them without drivers, for operation by hirer at his own risk, since chief characteristic of renting is giving up of possession to hirer, so that he uses and controls property. "Transportation of property by motor vehicle" involves bailment of goods for transportation and delivery by the carrier.

2. Automobiles ⇐59

Though transportation of gravel or slide material with trucks was for maintenance of public highway, it constituted transportation upon a public highway, so as to come within regulatory powers of Railroad Commission, as respects the minimum rate for transportation (Gen.Laws Supp.1935, Act 5129a).

3. Automobiles ⇐59

Highway Carriers' Act was applicable to highway common carrier, who was transporting gravel and slide material with trucks for Department of Public Works, so as to permit regulation of rates by Railroad Commission, as against contention that state agency was not bound by the act, since regulation was directed toward carrier and not toward agency of state (Gen.Laws Supp. 1935, Act 5129a).

4. Automobiles ⇐59

Highway Carriers' Act was applicable to highway common carrier, who was transporting gravel and slide material with trucks for department of public works, so as to permit regulation of rates by Railroad Commission, as against contention that Public Utilities Act indicates legislative policy or intent to exempt transportation for state from regulation, and to favor preferential charges to state, since Highway Carriers' Act authorizes commission to reject proposed preference if it appears to create an unjust or unreasonable discrimination against public interest (Gen.Laws Supp.1935, Act 5129a, and Act 6386, §§ 17(a) (4), 17.5).

*For subsequent opinion see 80 P.2d 987.

5. Automobiles ⇐127

The Railroad Commission is assumed to act in accordance with declaration of policy in the Public Utilities Act in favor of preferences to state, and under Highway Carriers' Act to approve any requested preference unless evidence shows particular preferential rate will constitute unjust or unreasonable discrimination, and that public interest will suffer thereby (Gen.Laws Supp.1935, Act 6386, §§ 17(a) (4), 17.5, and Act 5129a, § 11).

In Bank.

Proceeding by Paul Entremont and the People of the State of California, on the relation of the Department of Public Works, petitioners, against Leon O. Whitsell and others, as members of and constituting the Railroad Commission of the State of California, to review an order of the Commission.

Order affirmed.

Albert E. Sheets, of Sacramento, for petitioner Paul Entremont.

C. C. Carleton, C. R. Montgomery, Robert E. Reed, and Frank B. Durkee, all of Sacramento, for petitioner State Department of Public Works.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and Bourke Jones, Deputy City Atty., all of Los Angeles, amici curiæ.

Ira H. Rowell, Frank B. Austin, Scott Elder, and Mary J. Moran, all of San Francisco, for respondents.

LANGDON, Justice.

This is a petition to review an order of the Railroad Commission. Petitioners are Paul Entremont, holder of a permit as a radial highway common carrier, and the State Department of Public Works.

In February, 1936, Entremont entered into a contract with the division of highways of the Department of Public Works, by which he agreed "to furnish the service or rental" of three dump trucks of 3½ cubic yards capacity, for hauling gravel or slide material, and for other miscellaneous jobs as required in district 1 in northern California, for 500 hours each, at the rate of $2.50 per hour. Entremont was to furnish the drivers, and operate the trucks at his own expense. Performance under the contract was begun, and the service was rendered, on an 11-mile strip of state highway which was being repaired by the division of highways.

Prior to this work the Railroad Commission had established by its decision the minimum rate for transportation of sand, rock, gravel, excavated material and road building material in dump trucks of such capacity, pursuant to the terms of the Highway Carriers' Act (Stats.1935, chap. 223; Deering's 1935 Supp., Act 5129a, p. 1358). This minimum rate was $2.59 per hour. The commission thereafter on its own motion investigated the above activities of Entremont, and a hearing was held to determine whether its decision was being violated. After full consideration, and after intervention by the State Department of Public Works and others, the commission found that there was such a violation, and ordered Entremont to proceed to collect the undercharge, and to abstain thereafter from charging less than the minimum rate. This proceeding in review followed.

[1] The first contention of petitioners is that the agreement between Entremont and the Department of Public Works did not constitute the transportation of property for compensation over the public highways within the meaning of the Highway Carriers' Act, but was instead a hiring of trucks by the said department, and therefore within the provisions of sections 136 and 136.5 of the Streets and Highways Code (Stats.1935, chaps. 29, 514; Deering's 1935 Supp., Act 8220, p. 1754) requiring competitive bidding for the "leasing or renting of tools or equipment for state highway purposes." It is, of course, clear that, if Entremont had merely rented his trucks to the department, and the department had as user or lessee operated them for its purposes, the transaction would not be subject to the rate regulations of the commission. But if the transaction was, in fact, a transportation agreement, it would come within the regulatory powers of the commission regardless of the designation of it as a hiring of trucks.

The chief characteristic of renting is the giving up of possession to the hirer, so that the latter himself uses and controls the property. Cal.Civ.Code, §§ 1925, 1955. The renting of motor vehicles normally consists of furnishing them without drivers, for operation by the hirer at his own risk. Carriage of property, on the other hand, involves a bailment of goods for transportation and delivery by the carrier. See State v. Dabney,

176 Ark. 1071, 5 S.W.(2d) 304; Roeske v. Lamb, 39 N.M. 111, 41 P.(2d) 522; State v. Robinson, 42 Minn. 107, 43 N.W. 833, 6 L.R.A. 339. The undisputed facts show that Entremont, the purported lessor, was required to furnish his own employees as operators, and to supply all gas, oil, and other materials necessary for the operation of the machines; where unsatisfactory, they were to be replaced by him; he was to carry compensation insurance on the drivers, and to pay all the expense of repairs to the equipment; he assumed all responsibility for damage or injury to other persons or property by reason of the operation of the trucks. In the course of the work, Entremont and his employees took the usual directions from the foreman of the division of highways as to the material to be transported, but the tracks were in the possession of Entremont, operated by his employees, and subject to his control. Indeed, it would be difficult to conceive of his carrying out the requirements of his contract with respect to operation, repair, supplies, etc., unless he did have possession and control of the machines. The intermittent use of the trucks for miscellaneous hauling jobs, and the payment at an hourly rate, are fully consistent with a transportation contract of a trucking carrier.

Additional evidence on this point is afforded by the fact that Entremont held a permit as a highway carrier, and by the further fact that in his return to the state board of equalization filed in compliance with the Motor Vehicle License Tax Act (Stats.1933, chap. 339, p. 928), he included the income from the present contract as part of his gross receipts from operation of motor vehicles upon the public highways in the transportation of persons or property for compensation.

From all of these circumstances it appears that the commission was justified in characterizing his activities as transportation of property by motor vehicles and not the renting of tools or equipment. See Reavley v. State, 124 Tex.Cr.R. 528, 63 S.W.(2d) 709; Holmes v. R. R. Commission, 197 Cal. 627, 631, 242 P. 486. The case of People v. Tedesco (Cal.App.) 64 P.(2d) 966, cited by petitioners, is in no way helpful in this connection, for the decision was on demurrer, and the actual facts of operation do not appear.

[2] Petitioners further suggest that the transportation involved herein was for the purpose of maintenance of a public highway, and hence did not constitute transportation upon a public highway. There is no merit in this position, for regardless of the purpose of the hauling, there was an actual transportation of materials on a highway open to public travel. In Oswald v. Johnson, 210 Cal. 321, 291 P. 579, much relied upon by petitioners, the highway was under construction and repair, and was closed to public travel. The same was true in the case of Allen v. Jones, 47 S.D. 603, 201 N.W. 353.

[3, 4] The next contention of petitioners is that, even assuming that the contract was one for transportation and superficially within the terms of the Highway Carriers' Act, the statute should be construed as inapplicable thereto. The reasons advanced are, first, that the sovereign, in this case the state, is not bound by its statutes unless expressly mentioned, and second, that the Public Utilities Act (Gen.Laws 1931, Act 6386, and Supplements) and the Civil Code indicate a legislative policy or intent to exempt transportation for the state from regulation, and to favor preferential charges to the state.

The first reason is obviously based upon an unsound assumption. The Department of Public Works was in this case only a shipper, with materials to be moved. Entremont was the carrier. The statute does not cover shippers, but carriers, and the commission's regulation was directed toward the carrier, and not toward the state. Accordingly, the mere fact that Entremont was engaged in transportation for the state does not mean that the commission was regulating a state agency.

The second reason requires fuller consideration. Section 17 (a) (4) of the Public Utilities Act (Deering's Gen.Laws Supp. 1935, Act 6386) provides that common carriers may transport persons or property "free or at reduced rates" for the United States, state, county or municipal governments, where such free or reduced rate transportation is provided for in the contract. Section 17.5 of the act (Supp.1935) makes the same provision where transportation is for contractors carrying out contracts with the United States, state or other governmental agency in this state. Section 2171 of the Civil Code provides: "A common carrier must always give a preference in time, and may give a preference in price, to the United States and to this state." These provisions permit preferential rates to governmental agencies such as the Depart-

ment of Public Works, and there is nothing in the Highway Carriers' Act which attempts to prohibit such preferences. This has been recognized by the commission in a number of instances in which reduced rates to the state or subdivisions have been approved.

But though it is conceded that preferences to governmental agencies are authorized by the Public Utilities Act and not prohibited by the Highway Carriers' Act, it does not follow that any and every contract for a reduced rate is thereby rendered valid. The declaration of policy is not an absolute guarantee of preferences, and it does not determine questions of procedure. In this connection, an important section of the Highway Carriers' Act must be read. Section 11 of said act (Gen.Laws Supp.1935, Act 5129a) provides: "If any highway carrier other than a common carrier desires to perform any transportation or accessorial service at a lesser rate than the minimum rates so established, the Railroad Commission shall, upon finding that the proposed rate is reasonable authorize such rates less than the minimum rates established in accordance with the provisions of section 10 hereof." This section recognizes the possibility of valid preferential rates, and thereby supports and does not conflict with the declared policy in the above-quoted provisions of the Public Utilities Act. But it adds a requirement for highway carriers which is not made in the case of common carriers, namely, a prior application to the commission for authority to establish the rate; and it gives the commission power to reject the proposed preference, if it appears to create an unjust or unreasonable discrimination against the public interest.

In our opinion this section is clearly applicable to transactions with governmental agencies, and there is no reason for construing it otherwise. If it were not applied, preferences to such agencies would be entirely uncontrolled, with the consequent evils of unwarranted discrimination and price cutting by irresponsible carriers. The commission was given authority to approve reasonable preferences, and its authority must be upheld. Competitive bidding is not prevented; it is still possible to the fullest extent, subject to the commission's approval of the final bid, before the rate goes into effect. An instructive discussion of a similar authority of the Interstate Commerce Commission will be found in United States v. Tennessee, 262 U.S. 318, 43 S.Ct. 583, 67 L.Ed. 999. See, also, City of Hillsboro v. Public Service Commission, 97 Or. 320, 187 P. 617, 192 P. 390, where the court held that service to municipalities was within the regulatory powers of the commission.

[5] It is to be noted, also, that the requirement of prior application to the commission follows logically from the nature of the regulatory provisions of the Highway Carriers' Act. Under the Public Utilities Act, carriers subject thereto establish their own rates by filing tariffs with the commission, subject to the power of the commission to change them for good cause. Doubtless such carriers, under the provisions of the act dealing with preferences, may themselves contract for preferential rates to governmental agencies, and the rates thus made will apply, subject to any later action by the commission. Under the Highway Carriers' Act, perhaps because of the prior experience with large numbers of truckers who engaged in bitter competition at ruinously low rates, a system was established whereby the commission itself fixes the original rates and approves all changes, before they go into effect. There is no logical reason why this prior approval should not be secured before any preferential rate is given. It is to be assumed that the commission will act in accordance with the statutory declaration of policy in favor of preferences to the state, and, under section 11 of the Highway Carriers' Act, will approve any requested preference unless the evidence shows that the particular preferential rate will constitute an unjust or unreasonable discrimination, and that the public interest will suffer thereby. The present proceeding, of course, does not involve any issue of abuse of discretion in the disapproval of a preferential rate.

The order is affirmed.

We concur: CURTIS, J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.

9 Cal.2d 16

BOYLE et al. v. LAKEVIEW CREAMERY CO. et al.

L. A. 15888.

Supreme Court of California.

May 26, 1937.

Rehearing Denied June 24, 1937.

1. Corporations ⇐499

Under Franchise Tax Act, suspending powers, rights, and privileges of delinquent corporate taxpayer except for change of corporate name, delinquent corporate taxpayer could not defend action for misrepresentations connected with contract of sale of corporate assets, and could not appeal from adverse judgment, in view of statute permitting defense of actions notwithstanding delinquency as respects other taxes (Gen. Laws 1931, Act 8488, § 32; Pol.Code, § 3669c, as amended by St.1933, p. 298).

2. Corporations ⇐499

Under Franchise Tax Act, suspending powers, rights, and privileges of delinquent corporate taxpayer except for change of corporate name, purchasers were not estopped to deny delinquent corporation's power to defend action for misrepresentations connected with contract of sale of corporate assets by receiver, because of alleged recognition of corporate right to convey, and institution of action (Gen.Laws 1931, Act 8488, § 32).

3. Corporations ⇐499

Statute permitting continuance of corporate existence, following dissolution, to wind up corporate affairs, and prosecute and defend actions, did not authorize corporation to defend action, for misrepresentations connected with contract of sale of corporate assets, where corporation was delinquent in payment of taxes under Franchise Tax Act, suspending powers, rights, and privileges of delinquent corporate taxpayer except for change of corporate name (Gen.Laws 1931, Act 8488, § 32; Civ.Code, § 399, as amended by St.1933, p. 1403).

In Bank.

Appeal from Superior Court, Los Angeles County; H. D. Burroughs, Judge.

Action by Hugh J. Boyle and another against the Lakeview Creamery Company and another. Judgment was rendered for plaintiffs, and defendants gave notice of appeal and instituted proceedings for an order to show cause why the transcript should not be settled by the Supreme Court, and for mandate to compel a judge of the superior court to settle the transcript. On plaintiffs' motions to dismiss the appeal and to strike the clerk's transcript and reporter's transcript from the files, and on defendants' motion for an order to show cause why the reporter's transcript should not be settled.

Motion to dismiss the appeal granted, and other motions denied.

Prior opinion, 64 P.(2d) 943.

S. Y. Allen, of Los Angeles, for appellants.

Lewis D. Collings and Amos Friedman, both of Los Angeles, for respondents.

PER CURIAM.

This is a motion by respondents to dismiss the appeal in the above-entitled cause. Two other motions, hereinafter described, are before us.

Creditors of Lakeview Creamery Company, one of petitioners herein, brought a proceeding to have the company adjudged bankrupt, and a receiver was appointed to conduct the business. In October, 1932, Hugh J. Boyle, acting for Palo Verde Creamery, Inc., offered to purchase certain assets of Lakeview Creamery Company under an installment contract. This offer was accepted, a bill of sale was given, and some payments were made. Thereafter Boyle and Palo Verde Creamery, Inc., brought suit in the superior court of Los Angeles county against Lakeview Creamery Company and its trustee, so called, for damages for alleged misrepresentations in connection with the contract of sale, and recovered a substantial judgment on August 12, 1935. Defendants gave notice of appeal, and the reporter prepared the transcript, but when the same was ready for settlement, Judge Burroughs, who tried the case, had died. The clerk's office notified counsel that the transcript would be presented to Judge Schmidt in department 33 of said superior court, for settlement. Plaintiffs objected to the settlement of the transcript, and their objections were sustained by Judge Schmidt on April 23, 1936.

Thereupon defendants brought two proceedings for the purpose of settling the transcript. The first was an application filed in this court for an order to show cause why the transcript should not be settled by this court. The second was a separate proceeding [Lakeview Creamery

Co. v. Superior Court (Cal.Sup.) 68 P.(2d) 971], seeking mandate to compel Judge Schmidt to settle the transcript in the main action, as well as the transcript of the lower court proceedings in settlement, which took place before Judge Schmidt on April 23, 1936. Two other motions were then made by plaintiffs, one to strike the clerk's transcript and reporter's transcript from the files, and the other to dismiss the appeal.

In support of the motion to dismiss the appeal, respondents have raised a point which, if sustained, conclusively disposes of all of the proceedings. It is their contention that appellants have no capacity to take the appeal or to seek the affirmative remedy of mandate, because in 1934 the corporate powers, rights, and privileges of Lakeview Creamery Company were suspended for failure to pay its franchise taxes.

When this case was first before us, petitioner and appellant Sylvan Y. Allen represented to this court that he was a trustee appointed by the federal District Court, and, as such, duly authorized to act on behalf of the corporation. We accordingly held that he could bring the appeal and seek mandamus in his representative capacity, and found it unnecessary to decide whether the corporation itself was deprived of these rights. A petition for rehearing was then filed by respondent, in which it was demonstrated that these representations of Sylvan Y. Allen were false, and that the title of trustee had been assumed by him without authority. It is true that in the complaint and findings the fiduciary character of Allen is loosely stated as "attorney and trustee," but this does not give him the title and powers of a strict trustee, nor the privileges of a trustee appointed by the federal District Court. It was further represented by Allen in the prior hearing that the corporation was in bankruptcy and hence under the jurisdiction of the federal court. On rehearing it has been shown that the company was not, in fact, adjudicated a bankrupt; that by stipulation of creditors and the company, an attempt was made by the company to sell the assets apart from the bankruptcy proceedings, and thereafter, upon further stipulation a petition was filed to dismiss the bankruptcy proceedings, which petition was granted. The dismissal was to take effect on the consummation of the sale, but the effect of the court's order was to terminate the bankruptcy proceedings, leaving the company free to act as a corporation, through its own officers and agents, and without any representative appointed by and responsible to the federal court. These facts having been shown, the basis for the former opinion was eliminated, and we granted the petition for hearing. We are now called upon to determine whether the corporation has itself the necessary power to bring the appeal.

Section 32 of the California Bank and Corporation Franchise Tax Act (Deering's Gen.Laws, 1931, Act 8488) provides that for failure to pay the taxes levied thereunder, "the corporate powers, rights and privileges of the delinquent taxpayer, if it be a domestic corporation, shall be suspended and shall be incapable of being exercised for any purpose or in any manner except for the purpose of amending the articles of incorporation to set forth a new name, and the officers, directors and stockholders or members of any such corporation may take such action in their respective capacities as may be required by law in order to amend the articles of incorporation for such purpose." The section then provides criminal penalties for attempted exercise of such rights, privileges, or powers.

The deprivation of corporate rights and privileges for failure to pay taxes is a familiar statutory provision, but the scope of the deprivation has not always been the same. Under earlier California statutes the powers were forfeited, the corporation was dissolved, and it came under the control of trustees, with the result that the corporation itself could not sue or be sued, and a summons served upon it or a judgment rendered against it were void. See Rossi v. Caire, 186 Cal. 544, 549, 199 P. 1042; Ransome-Crummey Co. v. Superior Court, 188 Cal. 393, 396, 205 P. 446. Under our present statutes, the corporate powers of a domestic corporation are merely suspended, with certain exceptions. Thus, under section 3669c of the Political Code (as amended by St.1933, p. 298), it is provided that the corporate rights, privileges, and powers of the delinquent corporation shall be incapable of being exercised for any purpose or in any manner, "except to defend any action brought in any court against such corporation." As already pointed out, section 32 of the Franchise Tax Act also merely suspends the corporate existence, but contains a different provision as to exceptions.

[1] From a consideration of these statutes, the policy is clearly to prohibit the

delinquent corporation from enjoying the ordinary privileges of a going concern, in order that some pressure will be brought to bear to force the payment of taxes. Under the Political Code, § 3669c, which covers certain state taxes other than those specified by the Franchise Tax Act, the penalty is not made too drastic; the corporation may not sue, but it may defend. The theory is, doubtless, that the result of failure to pay state taxes should not be to offer an opportunity for the filing and successful prosecution of fraudulent or groundless suits against a corporation which has assets subject to execution, and which, if prevented from defending actions, would be a prey to sharpers. But the exception covering the defense of actions is omitted from Franchise Tax Act, which prescribes the entire procedure of levy and collection of the taxes imposed thereunder, as well as the penalties for delinquency. The omission seems deliberate, and indicates the legislative intention that such corporations shall be deprived of the power to defend suits. The statute expressly deprives the corporation of all "corporate powers, rights and privileges," subject to one exception, which is specifically set forth, the right to amend the articles to change the name. As the court declared in Ransome-Crummey Co. v. Superior Court, supra, 188 Cal. 393, 397, 205 P. 446, 448: "During the time its taxes were unpaid, petitioner was shorn of all rights save those expressly reserved by the statutes." The conclusion which we are forced to draw is that the appellant corporation has lost the right to defend the suit in question, and since it has no right to defend, it has no right to appeal from an adverse decision. See, also, 6a Cal.Jur. § 864, p. 1469.

[2] It is suggested that the plaintiffs in the main action, by recognizing the authority of the Lakeview Creamery Company to convey title to its properties and to be sued on grounds arising from the conveyance, are estopped to question its power to defend against the action. We are unable to see any estoppel here. The statute provides criminal penalties for exercise of any corporate powers not permitted, and the defense of the action by the suspended corporation would appear to constitute a violation of the law. Appellants' theory is equivalent to saying that because the corporation may not defend, it cannot be sued, or if it can be sued, it must be permitted to defend. While this may be a more reasonable policy than that expressed in the statute, it is not what the statute provides.

[3] Section 399 of the Civil Code (as amended by St.1933, p. 1403) has been cited in this connection. This provision deals with a corporation which is dissolved, or whose existence is forfeited, and permits it to continue in existence for the purpose of winding up its affairs, "prosecuting and defending actions by or against it," etc. This section has nothing to do with corporations which are penalized for failure to pay taxes, a subject covered by the other statutes mentioned. No penalty is contemplated by section 399, for the corporation may even bring actions, which no suspended corporation may do. The only purpose of section 399 is to stop further doing of business as a going concern, and limit corporate activities to winding up.

In concluding that the Lakeview Creamery Company has no power to defend or appeal in the above-entitled action, we are proceeding upon the assumption that the corporation was not, by reason of bankruptcy or receivership, under the jurisdiction of the federal court. The record before us shows no such federal jurisdiction.

Whether, as a result of this decision, the assets of the suspended corporation are exposed to seizure by persons suing on groundless claims, is something which we cannot determine. The Legislature has perhaps deemed the remedy of restoration of powers, by payment of back taxes, a sufficient protection against unfair litigation; and doubtless there are emergency measures, such as bankruptcy or receivership, which stockholders or other interested persons may be able to take to protect the corporation against serious loss.

The motion to dismiss the appeal is granted, and the appeal is dismissed. This disposes of the cause, and accordingly the motion for order to show cause why the reporter's transcript on appeal should not be settled, and the motion to strike the clerk's transcript and reporter's transcript from the files, are denied.

9 Cal.2d 779

LAKEVIEW CREAMERY COMPANY (a Corporation) and Sylvan Y. Allen, as Trustee, Petitioners, v. The SUPERIOR COURT of the State of California, IN AND FOR THE COUNTY OF LOS ANGELES, and the Hon. Ruben S. Schmidt, Judge of the Superior Court of the State of California, in and for the County of Los Angeles, Respondents.

L. A. 16003.

Supreme Court of California.

May 26, 1937.

Rehearing Denied June 24, 1937.

In Bank.

Prior opinion, 64 P.(2d) 941.

Sylvan Y. Allen and Harry C. Hedberg, both of Los Angeles, for petitioners.

Everett W. Mattoon, Co. Counsel, Douglas De Coster, Chief Deputy Co. Counsel, Lewis D. Collings, and Amos Friedman, all of Los Angeles, for respondents.

PER CURIAM.

This is a petition for a writ of mandate to compel the respondent superior court, and in particular, Judge Schmidt, to settle a reporter's transcript on appeal. On August 26, 1936, we issued an order to show cause directed to respondents.

Our decision in Boyle and Palo Verde Creamery, Inc., v. Lakeview Creamery Company and Sylvan Y. Allen, 68 P.(2d) 968, this day filed, disposes of the present case.

The petition is denied.



8 Cal.2d 741

MELENDEZ v. CITY OF LOS ANGELES.

L. A. 16125.

Supreme Court of California.

May 24, 1937.

Rehearing Denied June 21, 1937.

1. Negligence ⇐33(1)

Generally, landowner is not required to keep land in safe condition for trespassers.

2. Negligence ⇐47

A landowner maintaining a trap or concealed danger on land must use ordinary prudence to protect children from injury which might be expected and which can be guarded against without placing undue burden on owner and his right to make beneficial use of land.

3. Negligence ⇐39

Generally, pools and ponds of water do not come within atttractive nuisance doctrine.

4. Evidence ⇐10(5), 14

It is common knowledge that perils of water are instinctively known by 10 year old boy and that water running over soil operates against probability of continuous even bed.

5. Evidence ⇐10(5)

It is common knowledge that there are many pools in every running stream, and that, when bed of stream is not rock, deep places are found below bridges and culverts.

6. Municipal corporations ⇐845(2)

A complaint, framed under attractive nuisance doctrine, for death of children who were drowned when they fell into a deep hole in pool formed by storm drain maintained by city, did not state cause of action against city under statute, since the hole was not an artificial contrivance or appliance maintained by city (St.1923, p. 675, § 2).

In Bank.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Manuel T. Melendez against the City of Los Angeles. From a judgment sustaining a demurrer to the complaint, without leave to amend, plaintiff appeals.

Affirmed.

For prior opinion, see 60 P.(2d) 865.

Hansen & Sweeney and E. D. Yeomans, all of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and Bourke Jones and Leonard Husar, Deputy City Attys., all of Los Angeles, for respondent.

THOMPSON, Justice.

We granted a hearing in this case after decision by the District Court of Appeal of the Second District, Division 1, in order that we might give further consideration to the question of whether the rule

announced in Beeson v. City of Los Angeles, 115 Cal.App. 122, 300 P. 993, or the doctrine of Sanchez v. East Contra Costa Irr. Co., 205 Cal. 515, 271 P. 1060, should govern the determination thereof. The statement of facts is taken from the opinion by Mr. Justice Roth, sitting pro tempore.

"This is an appeal from a judgment entered upon an order sustaining a demurrer without leave to amend. The amended complaint in this case is predicated upon section 2, Statutes of 1923, p. 675 (Deering's Gen.Laws, 1931, Act 5619), which provides:

"'Counties, municipalities and school districts shall be liable for injuries to persons and property resulting from the dangerous or defective condition of public streets, highways, buildings, grounds, works and property in all cases where the governing or managing board of such county, municipality, school district, or other board, officer or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition of any such street, highway, building, grounds, works or property and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition or failed and neglected for a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition.'

"Briefly, the facts alleged in the first cause of action of said amended complaint are that on May 7, 1935, Daniel, aged 11, a son of plaintiff, was attracted to a pool of water on property belonging to respondent city, accepted an implied invitation to play thereon, and was drowned as a direct consequence of a defective and dangerous condition existing in said pool of water, know to respondent and unknown to Daniel. The pool was formed as the result of the maintenance of a storm drain by respondent. With regard to the pool and its formation, its maintenance and its use, it is alleged that for more than ten years, defendant owned and maintained a storm drain, which ran from a covered conduit under a public highway into an open storm drain ditch; that a drop of several feet from the covered conduit into the open storm drain ditch caused a deep hole to form; that the banks of the open storm drain were unprotected; and over a period of years this caving-in clogged up the storm drain so that a large pool was formed, which covered the deep hole; that the pool was surrounded by a sandy beach, and was adjoining the public highway, and easily accessible thereto by a pathway; that the deep hole in this pool was completely concealed by the muddy condition of the water in the pool; that this pool was located in a populated neighborhood in which several hundred children resided; that a raft and numerous boards were on the surface of this pool; that children regularly used this pool for a playground, and waded in the pool and used the raft that was kept thereon; that the children had no knowledge, nor reasonable means of knowledge, of the deep hole in this pool; that all these conditions had existed for more than two years to the actual notice and knowledge of the boards, officers, and agents of the defendant having the authority to remedy these dangerous and defective conditions, but the same were not remedied and no warnings were given or posted and no guards or protections of any nature whatever were furnished; and that these conditions could have been removed at a nominal cost to defendant without in any manner impairing the usefulness of the storm drain.

"Specifically, with regard to the drowning of Daniel, it is alleged that while using the raft in the pool, which was, except for the deep hole referred to, of shallow depth, Daniel, unaware of the deep hole, fell into it and was drowned. With reference to the character and formation of the pool, the complaint specifically alleges:

"'* * * said pool so formed was about forty-five (45) feet wide and about sixty (60) feet long; that the water in said pool was very muddy and was so cloudy and opaque that it was not at all transparent, and the depth of the water in said pool, or any part thereof, could not be determined by looking into said pool; that all of the water in said pool was between one and two feet deep with the exception of the depth of the water in the hereinafter described pit, trap, or hole; that at one place in said pool there was a deep pit, trap, or hole which was over seven (7) feet in depth and with a circular diameter at the top thereof of approximately ten (10) feet,

said deep pit, trap, or hole being just south of where said covered storm drain conduit emptied into said open storm drain ditch; that said deep pit, trap, or hole was caused, formed and constructed by said water flowing from said covered storm drain conduit, and dropping said one to two and one-half feet into said open storm drain ditch; that on said pool there floated numerous boards, poles, stakes, and a raft which had been constructed by several boards bound together and said raft was about five feet long and about two and one-half feet wide; that there was a pathway running from the south side of said Pico boulevard down the slope of the open storm drain ditch to the side of the pool; that said pool was easily accessible from said Pico boulevard by using said path; that around said pool there was a sandy beach ranging between ten and fifteen feet wide; that there was no guard, fence, covering, protection, or warning around said pool, around said storm drain ditch, or near said pool or storm drain ditch; that all the foregoing conditions, except where expressly stated to be otherwise, existed on the 7th day of May, 1935, and had existed for more than two years prior thereto; * * *'

"The second cause of action alleges that Ralph, aged 13, brother of Daniel, hearing Daniel's cries for help, rushed into the pool and was drowned in the attempt to save his brother's life."

[1-3] It is clear from the recited allegations that the complaint is framed to state a cause of action under the attractive nuisance doctrine as recognized in this jurisdiction if it may, under the facts, be so alleged. This exception to the general rule that the owner of land is under no obligation to keep it in a safe condition for trespassers is based upon the principle that one who maintains upon his land something in the nature of a trap or concealed danger is under a duty to use ordinary prudence and foresight to prevent an injury to children which might be expected where it can be guarded against without placing an undue burden upon the owner of the land and his right to make a beneficial use of it. Peters v. Bowman, 115 Cal. 345, 47 P. 113, 114, 598, 56 Am.St.Rep. 106; Cahill v. Stone & Co., 153 Cal. 571, 96 P. 84, 19 L.R.A. (N.S.) 1094; Faylor v. Great Eastern Q. Min. Co., 45 Cal.App. 194, 187 P. 101; Morse v. Douglas, 107 Cal.App. 196, 290 P. 465. See, also, 19 Cal.L.Rev. 86; 11 Harv.L.Rev. 46 and 434; Restatement of the Law of Torts, § 339; and Harper on Torts, § 93, p. 219. As indicated, this duty of the occupier of land is limited by a sort of balancing of the opposing conveniences and, on this basis, it is generally held that pools and ponds of water do not come within the attractive nuisance doctrine. The reasons for refusing to make an application of the doctrine in such cases are stated in Peters v. Bowman, supra, where it is said: "A body of water —either standing, as in ponds and lakes; or running, as in rivers and creeks; or ebbing and flowing, as on the shores of seas and bays—is a natural object, incident to all countries which are not deserts. Such a body of water may be found in or close to nearly every city or town in the land; the danger of drowning in it is an apparent open danger, the knowledge of which is common to all; and there is no just view, consistent with recognized rights of property owners, which would compel one owning land upon which such water, or part of it, stands or flows, to fill it up, or surround it with an impenetrable wall." In the same case on denial of a petition for rehearing, it is said: "As to common dangers, existing in the order of nature, it is the duty of parents to guard and warn their children, and, failing to do so, they should not expect to hold others responsible for their own want of care. But, with respect to dangers specially created by the act of the owner, novel in character, attractive and dangerous to children, easily guarded and rendered safe, the rule is, as it ought to be, different; and such is the rule of the turntable cases, of the lumber-pile cases, and others of a similar character." And, further indicating that the decision was based upon a balancing of the conveniences rather than upon a lack of attractiveness or danger: "His [the owner's] liability bears a relation to the character of the thing, whether natural and common, or artificial and uncommon; to the comparative ease or difficulty of preventing the danger without destroying or impairing the usefulness of the thing; and, in short, to the reasonableness and propriety of his own conduct, in view of all surrounding circumstances and conditions."

The rule of Peters v. Bowman is followed in Polk v. Laurel Hill Cemetery Ass'n, 37 Cal.App. 624, 174 P. 414, and applied to the case of Beeson v. Los Angeles, 115 Cal.App. 122, 300 P. 993,

a case on all fours with the one before us for determination. There, also, the pool of water was formed by a storm drain in which muddy water stood at an average depth of approximately one foot, except at one end where there was a pit or hole about seven or eight feet in depth concealed by the muddiness of the water and the débris, and caused by the emptying of the water into the open drainage ditch from a cement conduit with such force as to dig out the floor of the open drainage ditch. There also notice of the dangerous condition of the ditch and of the fact that children played there and failure to remedy the situation were alleged in the complaint. It was held that the doctrine of attractive nuisance did not apply on the ground that the concealed hole was not an artificial contrivance or appliance maintained by the owner of the ditch and, on this ground, the case was distinguished from Sanchez v. East Contra Costa Irr. Co., 205 Cal. 515, 271 P. 1060. In that case a child fell into an open irrigation ditch of the average depth of three feet and slipped into a tunnel which carried the water under a creek. The water in the canal was muddy and the opening of the tunnel could not be seen. It was held that the shallow muddy water in the canal, the concealed opening of the tunnel of a much greater depth which was wholly unguarded constituted a trap; that, while the children assumed the risk of the open, obvious, notorious danger incident to the canal, they did not assume the risk of an unknown, concealed, and unguarded danger, and therefore the case came within the doctrine of attractive nuisance.

[4-6] These two cases are not at variance when weighed in the light of all the circumstances. In the former case the court took into consideration the common knowledge that the perils of water are instinctively known even by a boy of ten years of age and the further fact that water running over soil operates against the probability of a continuous even bed. As is said in Tavis v. Kansas City, 89 Kan. 547, 132 P. 185, 187: "All know that there are many pools in every running stream, and, when the bed of the stream is not rock, deep places are found below every bridge and culvert through which much water passes. It is not practicable to provide openings in bridges or culverts large enough to carry away the water as rapidly as it falls in times of freshets, and the force with which the dammed water goes through the openings under such circumstances is likely to erode the soil or bed of the stream below the bridge. The same effect is noticeable at every bend in the stream, and also wherever there is a tree or other obstruction along the stream which affects the flow of the water." These matters of common knowledge should be applied in the instant case and differentiate it from the Sanchez Case. In the latter case there was a concealed contrivance which no one would suspect. And common knowledge again tells us that the remark of the learned justice in the Beeson Case that the boy in the Sanchez Case either slipped or was "sucked" into the syphon was justified.

We are compelled to conclude from what has been said that the rule announced and applied in the Beeson Case should govern the disposition hereof. Accordingly the judgment should be, and it is hereby, affirmed.

We concur: SHENK, J.; LANGDON, J.; CURTIS, J.; SEAWELL, J.



9 Cal.2d 12

BERRY HOTELS SYSTEM v. CAPITOL PROPERTIES, Inc., et al.

Sac. 5014.

Supreme Court of California.

May 26, 1937.

1. Constitutional law ⇐70(1)

A statute dispensing with recording of notice of default before exercising power of sale in trust deed given to secure payment of bonds authorized by corporation commissioner, if it makes an unconstitutional discrimination, is entirely void and cannot be rewritten by court to extend requirement to excepted class of trust deeds (Civ.Code, § 2924, as amended by St.1933, p. 1669; Const. U.S. Amend. 14).

2. Constitutional law ⇐305
Corporations ⇐481

A statute dispensing with recording of notice of default before exercising power of sale in trust deed given to secure payment of

bonds authorized by corporation commissioner does not make an unconstitutional discrimination, since corporate borrowers' indentures usually provide for fair method of foreclosure, and Legislature recognized lack of need for protection in enforcement of such obligations (Civ.Code, § 2924, as amended by St.1933, p. 1669; Const.U.S. Amend. 14).

3. **Constitutional law** ⇐305

A statute dispensing with recording of notice of default before exercising power of sale in trust deed given to secure payment of bonds authorized by corporation commissioner, if discriminatory between corporations whose bonds are sold within state under permit and those whose bonds are sold outside state without necessity of permit, is not unconstitutional, since such discrimination, if any, is rare and accidental (Civ. Code, § 2924, as amended by St.1933, p. 1669; Const.U.S. Amend. 14).

4. **Constitutional law** ⇐42

A corporation which suffered no injury and was not a member of class allegedly discriminated against could not complain that statute dispensing with recording of notice of default before exercising power of sale in trust deed given to secure payment of bonds authorized by corporation commissioner is discriminatory between corporations whose bonds are sold within state under permit and those whose bonds are sold outside state without necessity of permit (Civ.Code, § 2924, as amended by St.1933, p. 1669; Const.U.S. Amend. 14).

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by the Berry Hotels System against the Capitol Properties, Inc., and others. From a judgment for defendants, plaintiff appeals.

Affirmed.

Philip S. Ehrlich, Sidney Rhein, of San Francisco (Albert A. Axelrod, of San Francisco, of counsel), for appellant.

Stoney, Rouleau, Stoney & Palmer and Henry E. Monroe, all of San Francisco, for respondents Anglo-California Nat. Bank of San Francisco and West Coast Life Ins. Co.

Morrison, Hohfeld, Foerster, Sherman & Clark, of San Francisco, for respondent Capitol Properties, Inc.

McCutchen, Olney, Mannon & Greene, of San Francisco, and O'Melveny, Tuller & Myers and Louis W. Myers, all of Los Angeles, amici curiæ.

LANGDON, Justice.

This is an action to have a trustee's sale of property declared void. Judgment was for the defendants, and plaintiff appealed on the judgment roll.

In 1926 plaintiff issued and sold bonds in the sum of $325,000, secured by a deed of trust upon its real and personal property in Sacramento county. After delinquencies had occurred in payments of principal and interest, defendant trustee published and posted notice of sale of the real property, and on March 13, 1935, the same was sold to defendant Capitol Properties, Inc. Subsequently plaintiff brought this present action to set aside the sale on the ground that no notice of default was recorded in the office of the county recorder of Sacramento county three months prior to the sale.

Plaintiff relies upon an interpretation of section 2924 of the Civil Code (as amended by St.1933, p. 1669). That section provides that the power of sale in a deed of trust shall not be exercised unless notice of default be recorded at least three months before the sale. It exempts from its provisions a power of sale in a mortgage or deed of trust given "to secure the payment of bonds or other evidences of indebtedness authorized or permitted to be issued by the Commissioner of Corporations." The present bond issue comes within this exception, and accordingly the express language of section 2924 appears to refute plaintiff's contention.

Plaintiff, however, advances the following argument: Section 2924 violates the Fourteenth Amendment to the Federal Constitution and other provisions of the California Constitution prohibiting discrimination; by reason of this unconstitutional discrimination, the section is not rendered wholly void, but is subject to a construction which will extend its provisions for three months' notice of default to the excepted class of trust deeds in which plaintiff's obligation falls, namely, trust deeds to secure bonds authorized by the commissioner of corporations.

[1, 2] It is too clear for discussion that the second part of plaintiff's argument is unsound. If section 2924 does make an

unconstitutional discrimination between classes of obligations, the entire section with its three months' notice requirement is void; the court cannot rewrite the statute to make it cover the excepted classes, for there is not the slightest evidence that this would be in accordance with the legislative intent. See Mordecai v. Board of Supervisors, 183 Cal. 434, 192 P. 40. This alone would seem to dispose of plaintiff's appeal. However, we deem it desirable to point out that the classification in the section is entirely reasonable and proper. Individual or corporate borrowers, in single private transactions with a bank or other financing agency, are protected from the unfortunate results of quick sales on default by a three months period of grace. Corporate borrowers which obtain funds from the investing public by bond issues under indentures usually prepared by themselves with whatever protections they desire ordinarily require no such statutory period of grace. The indenture may, and usually does, provide for a procedure of foreclosure involving some consent by many scattered bondholders, action by a trustee, etc., and the proceedings normally take a great deal longer than three months. It is perfectly clear, therefore, that the Legislature has provided a protection against a possible evil in the enforcement of a certain class of obligations, and that in excepting another class from the provision made it has recognized that there is no need for, and no value in, the particular protection. Similar legislative classification of individual obligations and corporate bond issues has been frequently upheld. See Ex parte Girard, 186 Cal. 718, 200 P. 593; In re Washer, 200 Cal. 598, 254 P. 951; In re Washer, 78 Cal.App. 759, 248 P. 1068.

[3, 4] Plaintiff practically concedes this point, but contends further that a discrimination exists under the statute between corporate borrowers whose bonds are sold within this state under permit from the commissioner of corporations, and between corporate borrowers whose bonds are sold entirely outside the state without the necessity of a permit. Plaintiff has offered no evidence that any such type of financing actually exists, and it would seem to be quite an unusual occurrence that the whole of a bond issue, secured by property n California, would be sold outside this state. It is sufficient to observe that if there is, in actuality, any such discrimination, this does not condemn the statute because it is not only rare but obviously fortuitous and accidental, and in no way part of the legislative intent (see County of San Luis Obispo v. Murphy, 162 Cal. 588, 123 P. 808, Ann.Cas.1913D, 712; Hansen v. Vallejo Electric L. & P. Co., 182 Cal. 492, 188 P. 999); and plaintiff was not only not a member of the class allegedly discriminated against, but under the admitted facts had much more than the three months' grace period after its default and before sale. Since the statute did not discriminate against a class which included the plaintiff, and since it suffered no injury by the legislation, it is without power to complain even if, as may be doubted, any actual discrimination exists.

The judgment is affirmed.

We concur: CURTIS, J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.



21 Cal.App.2d 257

McDONOUGH et al. v. CHU CHEW SHONG et al.

Civ. 10263.

District Court of Appeal, First District, Division 1, California.

June 3, 1937.

1. Indemnity ⇐3

A contract indemnifying persons who had furnished bail to release a defendant charged with crime from imprisonment pending his trial was supported by a sufficient consideration, notwithstanding indemnity contract was executed after release from imprisonment of defendant, since sureties on bail bond could surrender prisoner at any time and relieve themselves of their obligation, which was of a continuing nature and had a present as well as a past consideration.

2. Indemnity ⇐15(6)

In action on contract indemnifying persons against any loss they might sustain by reason of their having furnished bail, defense of want of consideration was not

available to defendant in absence of pleading such defense.

3. Indemnity ⇐15(6)

In action on contract which indemnified persons who had furnished bail to release a defendant charged with a number of offenses, and which designated only one of charges, such designation being a mere recital forming no part of contractual obligation, complaint was not required to specify the various offenses with which defendant was charged, and omission to do so would not constitute a variance between indemnity contract and allegations of complaint.

4. Indemnity ⇐6

Contract indemnifying persons from loss they might sustain by reason of their having furnished bail should receive a fair interpretation which would be gathered from its language and circumstances surrounding its execution, so as to give effect to intention of parties.

5. Indemnity ⇐15(6)

In action on contract indemnifying persons against loss they might sustain by reason of their having furnished bail, no variance existed between indemnity contract and allegations of the complaint because charge upon which it was claimed person was held for bail as alleged in complaint was not the same as that mentioned in indemnity contract, where it appeared from contract that intention of parties was to keep person charged out of prison on all charges on which he was to give bail.

6. Pleading ⇐430(2)

In action on contract indemnifying persons against loss they might sustain by their having furnished bail, defense that there was a variance between indemnity contract and allegations of complaint because charge upon which it was claimed person was held for bail as alleged in complaint was not the same as that mentioned in indemnity contract was not available, where no question of variance was raised when indemnity contract was offered in evidence nor any showing made that a variance was claimed.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Peter P. McDonough and another, copartners in business under the firm name and style of McDonough Bros., against Chu Chew Shong, doing business under the name of Ng Gee Herb Company, Jew Wing, and Lim Ben. Judgment for the plaintiffs, and the defendant Lim Ben appeals.

Affirmed.

Snook & Snook & Chase, of Oakland, for appellant.

Edgar C. Levey, of San Francisco, for respondents.

TYLER, Presiding Justice.

Action upon an indemnity contract to guarantee plaintiffs from loss by reason of their furnishing bail. The facts show that on November 27, 1934, one Lee Young was arrested and imprisoned under an indictment charging him with violating the act of the Congress of the United States known as the Jones-Miller Act (as amended, 21 U.S.C.A. § 171 et seq.) relating to the importing and concealment of morphine, also section 37 of the Criminal Code of the United States relating to a conspiracy to commit any offense against the United States (18 U.S.C.A. § 88), and section 174, title 21, of the Code of Laws of the United States, (21 U.S.C.A. § 174), bail being fixed in the sum of $10,000. While imprisoned defendants in the action, so it is alleged in the complaint, requested plaintiffs to give or cause to be given in the federal court bail for the release of Lee Young from imprisonment and to procure his release pending the determination of the charges against him. It is further alleged that on or about December 6, 1934, defendants Lim Ben and Chu Chew Shong made, executed, and delivered to plaintiffs a contract in writing by the terms of which they agreed to indemnify plaintiffs against any and all liability which plaintiffs might suffer or incur by reason of the forfeiture of said bail or by reason of any violation of the conditions of any bail bond or undertaking. Pursuant to said agreement, plaintiffs caused the New Amsterdam Casualty Company, a surety company, to make, execute, and file in the United States District Court a bail bond in the sum of $10,000 for the release of Lee Young from custody pending the determination of the charges against him. In order to procure the company to make and execute the bond, plaintiffs indemnified said company of and from any and all liability created or arising under said bail bond by depositing securities exceeding in value the sum of $10,000

with the company. By reason of said bail bond Lee Young was released from imprisonment pending his trial on said charges. Prior to the time set by the federal court for his trial, Lee Young fled from the jurisdiction, without leave, and wholly failed to appear or present himself for trial, and said bail bond was forfeited, and under and pursuant to the order of the court decreeing the bond forfeited plaintiffs paid into court the said sum of $10,000 through the surety company. Thereupon this action was commenced by plaintiffs. The answer denied the execution of the agreement as alleged or that plaintiffs agreed with defendant Lim Ben that he should cause a bail bond to be given. Judgment went in favor of plaintiffs for the sum of $10,000 together with attorney's fees and costs and against defendants Chu Chew Shong and Lim Ben. Defendant Lim Ben alone appeals, no appeal having been taken by Chu Chew Shong, and as to him the judgment has become final.

[1, 2] The indemnity agreement was executed about a week after the release of Lee Young on the bail furnished by plaintiffs, for which reason it is claimed by appellant that there was no consideration for it as it applied to a past event. There is no merit in this claim. The contract was given not only to cause Lee Young to be released from imprisonment but also to keep him released until the trial of the proceeding against him. The consideration of such an indemnity agreement is sufficient, though given after the release from imprisonment of the party for whom the bond was given, since the sureties on such bond could surrender the prisoner at any time and relieve themselves of their obligation. The obligation is of a continuing nature and has a present as well as a past consideration. United States Fidelity & Guaranty Co. v. Curry, 126 Neb. 705, 254 N.W. 430; 31 Cor.Jur. 422; 6 R.C.L. 673. Moreover, appellant failed to plead want of consideration or any other affirmative defense whatsoever.

[3-6] Again, it is claimed that there is a variance between the indemnity contract and the allegations of the complaint in that the charge upon which it is claimed the person was held for bail, as alleged in the complaint, was not the same as that mentioned in the indemnity contract. While the indemnity contract refers to the charge of violating the Harrison Narcotic Act (38 Stat. 785), no mention being made of the Jones-Miller Act or the conspiracy charge, the designation of the offense is a mere recital and forms no part of the contractual obligation. It was therefore not necessary to mention or specify the various offenses with which the defendant was charged, and the omission so to do affords no ground for the claiming of a variance as it did not affect the agreement. County of Los Angeles v. Farnsworth, 4 Cal.App.(2d) 516, 41 P.(2d) 577; County of Los Angeles v. Rickert, 84 Cal.App. 403, 258 P. 134; 6 Cor.Jur., p. 1003, sec. 244.

The instrument in question is to receive a fair interpretation, which is to be gathered from its language and the circumstances surrounding its execution, so as to give effect to the intention of the parties. C. Ganahl Lumber Co. v. Thompson, 205 Cal. 354, 270 P. 965. So construed, it is manifest that the intention of the parties was to keep the person charged out of prison on the different charges on which he was to give bail, which amount was the sum of $10,000. Moreover, no question of variance was raised when the indemnity contract was offered in evidence at the trial, nor was there any showing of any kind that a variance was claimed.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

21 Cal.App.2d 221

BAIRD v. SMITH.

Civ. 5683.

District Court of Appeal, Third District, California.

May 28, 1937.

1. Physicians and surgeons ⇐23

Ordinarily, value of physician's service is not dependent on saving of life of patient.

2. Venue ⇐66

Change of venue affidavits based only on information and belief are of little value when facts are within knowledge of or are accessible to affiant.

3. Venue ⇐68

A counter affidavit meeting material issues raised by application for change of venue, with mere conclusions, without stating facts upon which conclusions are based, does not warrant denial of application.

4. Venue ⇐68

A motion under statute, for change of place of trial of assumpsit action for reasonable value of medical services rendered defendant's husband, for convenience of plaintiff's witnesses, should be granted, where defendant concedes nature and extent of services, and her counter affidavits do not properly aver that defendant's expert witnesses will testify as to value of services (Code Civ.Proc. § 397, subd. 3).

5. Venue ⇐52(1)

The granting or refusal of motion for change of venue made under statute, for convenience of witnesses, rests largely in sound discretion of court to which motion is addressed (Code Civ.Proc. § 397, subd. 3).

6. Venue ⇐52(1)

The inconvenience of parties to the act, as distinguished from witnesses, is not to be considered in granting or refusing motion for change of venue made under statute, for convenience of witnesses (Code Civ.Proc. § 397, subd. 3).

7. Venue ⇐52(3)

The denial of plaintiff's motion made under statute, for change of place of trial of assumpsit action for reasonable value of medical services rendered defendant's husband, for convenience of ten physicians connected with staff of prominent hospital and having personal knowledge of case and ready to testify as to value of services, was abuse of discretion, where defendant's witnesses, whose convenience would be served by denial of motion, were not averred to have any personal knowledge of value of services (Code Civ.Proc. § 397, subd. 3).

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Action by C. S. Baird against Mrs. Ida Smith, as administratrix of the estate of Charles Smith, deceased, and Mrs. Ida Smith, individually. From an order denying plaintiff's motion for change of place of trial, the plaintiff appeals.

Order reversed, with direction.

Clarence E. Todd, of San Francisco, for appellant.

J. Oscar Goldstein, of Chico, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiff has appealed from an order denying his motion for a change of the place of trial to the city and county of San Francisco for the convenience of witnesses and to meet the ends of justice pursuant to section 397, subdivision 3, of the Code of Civil Procedure. It is claimed the denial of the motion constitutes an abuse of discretion.

A suit in assumpsit was brought in the municipal court of San Francisco upon the assigned claim of Dr. Howard C. Naffziger of that city for the sum of $1,250 as the reasonable value of medical and surgical services performed by him upon the husband of the defendant, Ida Smith. The action was transferred to Butte county, which is the place of residence of the defendant. An answer was filed admitting that the services were performed, but denying that they were performed "at the special instance or request" of the patient or of his wife, or that they were reasonably worth more that $250. Plaintiff then moved for a change of venue back to the city and county of San Francisco for the convenience of witnesses and in the interest of justice. This motion was supported by affidavits, to which counter affidavits were filed. Plaintiff's affidavits are in proper form. His affiants aver that the trial of the cause in San Francisco will accommodate fifteen named witnesses, most of whom are employed in the University of California Hospital at San Francisco, where

the operation was performed and where the patient was treated. Ten of these witnesses, exclusive of Dr. Naffziger, are averred to be practicing physicians, most of whom belong to the said hospital staff, and who are each personally familiar with the condition of the patient, the treatment which he received and the operation which was performed, and that each will testify to the nature and the value of the services performed. Some of the physicians were consulting or attending physicians who assisted Dr. Naffziger in the operation. The other witnesses consist of nurses who attended the patient, or custodians of the charts and records of the hospital. One of the physicians superintended the taking of X-ray pictures and reported the result thereof. Another physician administered the anesthetic at the time of the operation. It is averred each of these physicians is personally familiar with the case, and that none of the witnesses can attend a trial in Butte county without great loss and inconvenience to them and to the said hospital.

Two affidavits were filed in opposition to the motion. One affidavit was made by the defendant, Mrs. Smith, and the other by her attorney. The affidavit of Mrs. Smith avers that it is necessary to have present at the trial four physicians of Butte county, whom she names; that these physicians knew the condition of the patient prior to the time he went to the San Francisco hospital and will testify that his ailment was fatal and that it was useless to perform the operation for the reason that the patient was bound to die; that, on information and belief, these physicians would testify as to the character and value of the services of Dr. Naffziger, and that they "were not worth the sum alleged in the complaint." The averments which are made on information and belief are valueless.

The affidavit of the attorney for the defendant merely avers, as mere conclusions, with respect to each physician named by the plaintiff as necessary witnesses, that the physician is "not a necessary or proper witness" and "is not qualified to testify as to the amount and value of the services of Dr. Naffziger." Similar conclusions were stated with respect to other witnesses. The reasons for such alleged disqualifications are not stated. The affiant does further state, on information and belief, that seven of the physicians named in the plaintiff's affidavits are mere employees of the said hospital as internes without the knowledge or experience qualifying them to testify to the character and extent of the services performed. This affidavit does purport to stipulate with respect to certain physicians that defendant will admit "the character and extent of the services" performed. With respect to most of the physicians named by the plaintiff, this offer to stipulate to the character of the services performed is not made. This affidavit is pregnant with mere conclusions.

After a critical examination of the affidavits on motion for the change of place of trial, we are of the opinion the court abused its discretion in denying the application. It seems clear that the convenience of witnesses and the interest of justice requires a change of venue to San Francisco. If the convenience of eight or ten physicians and half a dozen employees of a prominent institution like the University of California Hospital does not establish just cause for a change of the place of trial of a suit without proper rebuttal, under the circumstances of this case, we are of the opinion it would be difficult to make an adequate showing which would require a change of venue for the convenience of witnesses. Ten physicians who are averred to have personal knowledge of the case and who will testify to the value of the services will be accommodated far more than nonexpert witnesses who are not connected with a great institution like the University of California Hospital. Even though we do not consider the other nurses and officers of the institution who are named as necessary witnesses, there is still a very persuasive showing requiring the change of venue.

[1] On the contrary, there appears to be no competent evidence of material facts to be testified to by any physician in Butte county, who will be convenienced by retaining the trial in the last-mentioned county. The affidavit of Mrs. Smith merely names four physicians whom she avers, on information and belief, will testify as to the character and value of the services. The fact that these physicians will testify, as averred, that the operation was useless and ineffectual to save the life of the patient is not material to the issues of this case. Ordinarily the value of a physician's service is not dependent upon the saving of the life of a patient. The marvelous skill of the greatest surgeons in the world is sometimes futile.

[2] Affidavits for a change of venue which are based only on information and belief are of little or no value when the facts are within the knowledge or accessible to the affiant. Such affidavits create no conflict of evidence. Higgins v. City of San Diego, 126 Cal. 303, 58 P. 700, 59 P. 209; Kellett v. Kellett, 2 Cal.(2d) 45, 39 P.(2d) 203; 1 Cal.Jur. 671, § 17.

[3] So, also, the counter affidavit of the attorney in this case is of little value for the reason that most of the material issues are met by mere conclusions, without stating facts upon which the conclusions are based. It is said in 1 California Jurisprudence, 669, § 15 that: "An affidavit which does not state the probative facts necessary to be alleged but which states conclusions of law, is a nullity, and any order based thereon is void."

[4] Assuming that the defendant would concede for the purpose of the trial the nature and extent of the services performed, it does not definitely appear from any properly averred statement in the defendant's counter affidavits that any of their expert witnesses can or will testify as to the value of the services. This seems to make it imperative under the showing to grant the motion.

[5, 6] It is well-settled law that the granting or refusal of a motion for a change of venue for the convenience of witnesses rests largely in the sound discretion of the court to which the motion is addressed. Blossom v. Waller, 30 Cal.App. 439, 158 P. 509; Scott v. Stuart, 190 Cal. 526, 213 P. 947. The inconvenience of the parties to the act as distinguished from the witnesses is not to be considered in a motion of this nature. Wrin v. Ohlandt, 213 Cal. 158, 1 P.(2d) 991; Blossom v. Waller, supra.

The Wrin Case, supra, upon which the respondent relies, is clearly distinguishable from the facts of this case. In affirming an order changing the place of trial, the court there said that the witnesses upon whom the appellant in that case relied were "the real parties in interest as plaintiffs in the action," whose evidence should not be considered in determining the motion. That is not true in the present case. It is further said in the Wrin Case that, aside from these two parties to the action, there was but one other witness to be convenienced, and that there was no showing that "this remaining witness has any personal knowledge of any of the facts in the case." Upon the contrary, in the present case it does not appear that any of the witnesses relied upon by the respondent have any personal knowledge of the facts relating to the only remaining issue which is the reasonable value of the services performed.

[7] We are of the opinion the court inadvertently abused its discretion in denying the motion.

The order is reversed, and the court is directed to grant the motion for a change of venue to the city and county of San Francisco.

We concur: PULLEN, P. J.; PLUMMER, J.



21 Cal.App.2d 176

CONE v. WESTERN TRUST & SAVINGS BANK et al.

Civ. 10512.

District Court of Appeal, First District, Division 2, California.

May 27, 1937.

1. Fixtures ⇐27(2)

An agreement between landlord and tenant that property shall retain its personal character or be removable as personalty though affixed to land is valid.

2. Landlord and tenant ⇐161(1)

Where right of removal of property by tenant is claimed under express agreement permitting removal as part of consideration of lease contract, tenant does not lose such right by expiration of term, but may exercise it within reasonable time thereafter.

3. Fixtures ⇐32

Under lease containing provisions for redelivery of premises in good order and for removal by lessee of buildings, tanks, and certain other property at any time during term, and provision that "upon the termination" of lease lessee should surrender possession and remove such property, lessee could remove such property within reasonable time after termination of lease.

4. Landlord and tenant ⇐161(1)

Under lease whereby lessee had reasonable time after termination thereof to

remove certain property, term of lease was not enlarged, and lessee was not entitled to possession, but merely to right of ingress and egress for limited time and for limited purpose of removing property.

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by O. S. Cone, as assignee of the Export Petroleum Company of California, Limited, against the Western Trust & Savings Bank and others. From the judgment, defendants D. R. Wilson and another appeal, opposed by plaintiff and the other defendants.

Affirmed.

A. L. Abrahams and Frank H. Love, both of Los Angeles, for appellants.

Bicksler, Parke & Catlin and William E. Woodroof, all of Los Angeles, for respondents.

SPENCE, Justice.

This is an action for declaratory relief arising out of a controversy concerning the rights of the parties under a lease. There were assignments and substitutions of parties, but, for the purpose of this discussion, we may refer to the parties as plaintiff and defendants in the same manner as though the original parties to the lease were the parties and the only parties to the action. It was the contention of plaintiff that under the terms of the lease, plaintiff had the right to remove the buildings, trade fixtures, and personal property within a reasonable time after the expiration of the lease while it was defendants' contention that such right terminated at the expiration of said lease. The trial court sustained the contention of plaintiff and determined that a period of thirty days was a reasonable time for such removal. Judgment was entered accordingly and defendants appeal.

The lease, after describing the premises, recited that the title thereto "and to that certain oil and gasoline refining plant, consisting of buildings and structures, tanks, stills, boilers, agitators, machinery, and equipment, located upon said real property," was vested in the defendants. It further recited that concurrently with the execution of the lease, the defendants had executed and delivered an agreement under the provisions of which the defendants had sold and conveyed to plaintiff "all that certain oil and gasoline refining plant above referred to and described" and had executed and delivered to plaintiff a "bill of sale thereto," which agreement and bill of sale were "referred to and made a part" of the lease. Then followed the terms and conditions of the lease of the real property and the terms of an option to purchase the real property. The consideration for the purchase of the buildings and equipment under the above-mentioned agreement was the sum of $7,000 which was paid to defendants. Plaintiff went into possession and thereafter made other improvements and brought other personal property on the premises and the total value of all buildings, equipment, and other personal property was the sum of $22,000. There are three clauses of the lease which are of particular importance in this discussion.

Clause 4 read: "The lessee shall keep said premises in a clean and healthful condition, and comply with all state, federal, county and city laws, orders and regulations in connection with the use of said premises, and agrees to deliver and yield up said demised real property to the lessor in as good order as the same is now in, at the end of the term of this lease, either by lapse of time, by forfeiture, by abandonment, or in any other manner."

Clause 5 read: "The lessee shall have and he is hereby expressly granted the right to remove from said demised real property the buildings and structures, tanks, stills, boilers, agitators, machinery and equipment now located thereon, or that may hereafter by the lessee placed thereon, including accessories, replacements and additions, in whole or in part, at any time or times prior to the termination of this lease."

Clause 25 read: "Upon the termination, forfeiture, abandonment, cancellation or expiration of this lease the lessee shall quietly and peacefully surrender possession of the same to the lessor and shall deliver said premises to the lessor as nearly in its present condition as shall be physically possible, and shall remove therefrom all debris, together with all buildings, structures, tanks, stills, boilers, agitators, machinery and equipment, and any and all other property thereon."

[1] It is apparent from what has been said that the controversy between the parties relates solely to the construction of the terms of the lease with respect to the time for removal of the property. It is

conceded that an agreement that property shall "retain its personal character or be removable as personalty, even though affixed to the land, is valid." Dauch v. Ginsburg, 214 Cal. 540, 544, 6 P.(2d) 952, 954; Chowchilla Colonization Co. v. Thompson, 39 Cal.App. 517, 519, 179 P. 411; 12 Cal. Jur. 566; 12 Cal. Jur. 580. It seems to be further conceded that the above-quoted clauses of the lease relating to removal are neither ambiguous nor repugnant. The question then is, Did the right of plaintiff to remove the property terminate at the instant of the expiration of the term of the lease or did that right exist for a reasonable time thereafter?

We are of the opinion that the authorities hereinafter cited clearly indicate that the trial court correctly determined that plaintiff's right to remove the property existed for a reasonable time after the expiration of the lease. Before further discussing the provisions of the above-mentioned clauses of the lease, we quote from some of the authorities on this general subject.

[2] In Earle v. Kelly, 21 Cal.App. 480, at page 484, 132 P. 262, 264, the court said: "It has been held that, where the removal is claimed under an express agreement permitting the act to be done as a part of the consideration of the lease contract, the tenant does not lose that right by the expiration of his term, but may within a reasonable time thereafter exercise it."

One of the reasons for the rule is expressed in Caperton v. Stege, 91 Ky. 351, 15 S.W. 870, 16 S.W. 84, where the court said, "By the terms of the lease the appellee had the right to use and occupy the improvements during the entire term, and to remove the improvements on the expiration of the term; and to require him to remove the improvements before the expiration of his term would violate his contract right to use and occupy them on the premises until the expiration of his term; and to refuse him the right to remove them after the expiration of the lease, provided he did it in a reasonable time, would cause him to lose his property by availing himself of his contract right."

In Smith v. Park, 31 Minn. 70, 16 N.W. 490, at page 491, the court said: "The terms of the lease giving the right of removal at the expiration of the term, the tenant was not required to remove the house during his term, but might occupy it as a dwelling-house during the full term, and then within a reasonable time remove it."

Other authorities containing similar language might be quoted, but it is sufficient merely to refer to a few of them: North v. Augusta Real Estate Ass'n, 130 Me. 254, 155 A. 36; Rasch v. Safe Deposit & Trust Co., 136 Md. 435, 111 A. 121; Lindsay Bros. v. Curtis Pub. Co., 236 Pa. 229, 84 A. 783, 42 L.R.A.(N.S.) 546; Bodwell Water Power Co. v. Old Town Electric Co., 96 Me. 117, 51 A. 802; Davidson v. Crump Mfg. Co., 99 Mich. 501; 58 N.W. 475; Kuhlmann v. Meier, 7 Mo.App. 260; 26 Cor.Jur. 713; 36 Cor.Jur. 64; 12 Cal. Jur. 580.

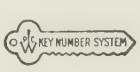
[3] When we examine the provisions of clause 25, we find that it provided that "upon the termination" of the lease, plaintiff should remove from the premises "all buildings, structures, tanks, stills, boilers, agitators, machinery and equipment, and any and all other property thereon." This clause not only imposed a duty but it also necessarily conferred a right upon plaintiff to remove the property mentioned "upon the termination" of the lease. If that clause had stood alone, plaintiff would unquestionably have had a reasonable time after the expiration of the lease within which to remove the property. But defendants contend that when clauses 4, 5, and 25 are read together, the conclusion must be reached that the right of removal terminated with the expiration of the lease. We find no merit in this contention. Clause 4 is but the usual clause found in practically all leases providing for the yielding up of the premises in good order at the end of the term. Clause 5 is one which grants to plaintiff the right to remove any of the property at any time during the term of the lease. We cannot agree with defendants that "clause 25 is but a repetition of clauses 4 and 5." Construing all of these clauses together and giving effect to all of them (Civ.Code, § 1641), we believe that the only reasonable construction to place upon said clauses is that clause 25 defined the rights and duties of the parties with respect to the removal of the property "upon the termination" of the lease; that said rights and duties were in addition to those conferred and imposed by the other clauses of the lease and were not modified or affected by anything contained in clauses 4 and 5; and that the parties therefore had a reasonable time after the expiration within which to exercise the rights conferred and to perform

the duties imposed by said clause 25. If the parties had intended otherwise, they could have used the expression "prior to the termination" rather than "upon the termination" of the lease in clause 25 thereof but such was not their agreement.

[4] The effect of the foregoing construction of the lease is not to enlarge the term thereof. After the expiration of the lease, plaintiff was not entitled to possession of the premises, but was merely entitled to the right of ingress and egress for a limited time and for the limited purpose of removing the property. 36 Cor.Jur. 64, § 682.

The judgment is affirmed.

I concur: STURTEVANT, J.



21 Cal.App.2d 289

STATE ex rel. CAGE v. PETROLEUM RECTIFYING CO. OF CALIFORNIA.

Civ. 11273.

District Court of Appeal, Second District, Division 1, California.

June 7, 1937.

Hearing Denied by Supreme Court Aug. 5, 1937.

Quo warranto ⇐36, 62

The Attorney General was in complete control of conduct of quo warranto proceeding, and could dismiss proceeding notwithstanding objections of relator, and relator was not "party" to proceeding and could not appeal from order upholding Attorney General's right to dismiss proceeding.

[Ed. Note.—For other definitions of "Party," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Proceeding by the State, on the relation of John M. Cage, against the Petroleum Rectifying Company of California. From an adverse order, relator appeals.

Appeal dismissed.

Jerrell Babb, Lewis D. Collings, and Edward M. Selby, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for respondent State.

Bauer, Macdonald, Schultheiss & Pettit, of Los Angeles, for respondent Petroleum Rectifying Co.

HOUSER, Presiding Justice.

The question which is involved in the instant appeal relates to the right of the Attorney General of this state to direct the dismissal of a proceeding in the nature of quo warranto which theretofore, at the instance of an informant, the Attorney General had authorized to be instituted and maintained, and, as incidental to such question, the further inquiry regarding the right of the relator to prosecute the instant appeal, which purports to be from an order which was made by the superior court by which a motion, which prior to that time had been made by the relator to vacate the order of dismissal of the said proceeding which theretofore had been made by the court, was denied. More briefly stated, the question is: A proceeding in the nature of quo warranto having been duly commenced at the instance of a relator, who, thereafter, is entitled to control it?

Prior to the filing of briefs on the merits herein, a motion to dismiss the appeal was denied by this court, without prejudice to the right at this time to again present the points which had been urged on said motion to dismiss the appeal.

In substance and effect, by decisions that have been rendered by the Supreme Court of this state, in principle, if not directly, both of the questions that are here suggested have been completely answered; hence, at least as far as concerns any court of lesser jurisdiction than that possessed by the Supreme Court, it would be a useless effort to devote time and energy to a discussion which might lead either to a concurrence with, or to a dissent from, the views which heretofore have been expressed with reference to the power of the Attorney General in the premises, or to the lack of authority on the part of the relator to exercise any semblance of control of what may be termed the mechanical processes in the proceeding.

In the case of People ex rel. Warfield v. Sutter Street Ry. Co., 117 Cal. 604, 612, 49 P. 736, 737, is was said: "The proceeding is by information by the attorney general. When the proceeding is in the interest of private persons, in whole or in

part, it is said to be by relation, and, under the provisions of the Code, the relator may be required to give security for costs. The information, however—that is, the complaint,—is signed and filed by the attorney general as attorney, and doubtless, as attorney, he has control of the action. I know of no such distinction as that made by counsel, and attributed to the late attorney general. If the proceeding is one in which a private person can have no interest, the proceeding is not properly by relation. But the attorney general had the power to institute the proceeding, and in either form it is by him. If, unnecessarily, he has added that it is by relation of a named person, that does no harm. It does not convert the proceeding into a private action."

It thus affirmatively appears, not only that the fact that the proceeding is entitled "by relation" does not convert it "into a private action," but as well, that "in either form * * * the attorney-general as attorney * * * has control of the action."

But the most persuasive case with relation to the decisive points here at issue is that of People ex rel. Hershey v. Reclamation District No. 108, 169 Cal. 786, 147 P. 1176, wherein the entire opinion by the court is expressed in one short paragraph, as follows: "In this action (quo warranto) instituted by the people of the state of California upon the relation of appellants, the relators alone are attempting to appeal from a judgment for defendant given upon sustaining a demurrer to the complaint. The notice of appeal states that they take the appeal 'because they are parties in interest and because the Attorney-General declines to take an appeal in the name of the state.' Under our law such an action may be brought and maintained only by the Attorney General in the name of the people of the state, and the relators are not 'parties' to the action. An attempt to appeal by them alone is necessarily ineffectual for any purpose."

The language employed in that opinion is very clear, and in itself is determinative of the instant appeal; that is to say, that irrespective of the merits of the case, as may have been disclosed by the pleadings that were presented in the lower court, and even in the face of the fact that the Attorney General "declines to take an appeal in the name of the state," an attempted appeal by the relators is "ineffectual for any purpose"; in other words, as far as the prosecution of the action is concerned, that the Attorney General is in absolute and complete control of the conduct of the proceedings, and that no matter what the nature or the extent of the interest which the relators may have therein, they are not "parties to the action," and consequently can exercise no control with reference thereto.

To the same effect, see People v. Milk Producers' Ass'n, 60 Cal.App. 439, 212 P. 957.

Many other California authorities might be cited which recognize the existence of legal principles which lie at the foundation of those to which attention hereinbefore has been directed. It is deemed unnecessary so to do. On the other hand, the several authorities which are cited in appellant's brief, upon the questions here presented, are distinguishable in their respective facts from those which we deem to be controlling herein.

It is ordered that the appeal be, and it is, dismissed.

We concur: YORK, J; DORAN, J.



21 Cal.App.2d 247

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al. v. FEIG et al.

Civ. 10497.

District Court of Appeal, First District, Division 2, California.

June 2, 1937.

Rehearing Denied July 2, 1937.

Hearing Denied by Supreme Court July 29, 1937.

1. Judgment ⇐735

A judgment purporting to adjudicate matter not litigated nor within issues is not res judicata with respect to such matter in subsequent action.

2. Appeal and error ⇐837(2)

Where pleadings in previous action are made part of pleadings in subsequent action, and entire record of previous action is introduced in evidence, reviewing court may consider previous pleadings and record in determining what issues in previous action

were as respects plea of res judicata in subsequent action.

3. Judgment ⇐713(2)

A final judgment in previous action by husband against executor of deceased wife to declare trust against wife's property, ordering that executor pay interest and damages for detention of property, was res judicata as to executor's claim in subsequent action that executor was chargeable only with interest and rents actually received less deductions for expenditures, since executor could and should have asserted its equities in previous action.

4. Judgment ⇐719

As respects plea of res judicata, petition in husband's action against deceased wife's executor to impress trust against wife's property, alleging demand for surrender of property and refusal by executor, and asking money damages, put in issue husband's rights to damages for detention of realty and interest on wrongfully withheld money.

5. Equity ⇐39(1)

Equity will not deal with case by piecemeal, but when all parties to controversy are before court, will adjust rights of all and leave nothing open for litigation.

Appeal from Superior Court, City and County of San Francisco; Maurice T. Dooling, Judge.

Action by the Bank of America National Trust & Savings Association and another against Joseph Feig and another. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Leo R. Friedman, James J. Harrington, and Keyes & Erskine, all of San Francisco, for appellants.

Reisner & Deming, of San Francisco, for respondents.

SPENCE, Justice.

In an action previously brought, defendant Feig had recovered judgment against plaintiffs herein. Feig v. Bank of America, etc., Ass'n, 5 Cal.(2d) 266, 54 P.(2d) 3. After that judgment had become final, plaintiffs brought this action: Their amended complaint, upon which this action went to trial, was entitled "Amended complaint by trustee to secure settlement of his accounts." Defendants interposed several defenses, including the defense of res judicata. The trial court found in favor of defendants upon said defenses and entered judgment accordingly. Plaintiffs appeal from said judgment.

[1] Appellants' contentions are (1) "that a judgment purporting to adjudicate a matter not within the issues or litigated is not res judicata with respect to such matter in a subsequent action"; (2) that "the issue in the first action was confined to the existence of the trust and this was the only question litigated"; and (3) that "the first judgment purporting to adjudge that the bank should pay interest at the legal rate and should pay damages for withholding the real property is not res judicata in this proceeding and does not preclude the bank from securing a decree in this action that it is chargeable only with the interest and rents actually received by it," less deductions for its expenditures.

The first above-mentioned contention of appellants consists of an abstract statement of law and the correctness thereof may be conceded for the purpose of this discussion. Bray v. Payne, 210 Cal. 465, 292 P. 478; Callnon v. Callnon, 7 Cal.App.(2d) 676, 46 P.(2d) 988; see, also, Baar v. Smith, 201 Cal. 87, 255 P. 827. The second above-mentioned contention is the vital one in the present case for it constitutes the premise upon which the third contention is based. If said second contention is found to be without merit, then the third contention must necessarily fall. It therefore becomes necessary to examine the issues in the first action in order to determine whether the issue there "was confined to the existence of the trust."

The facts out of which this litigation arose are fully set forth in the opinions on the two appeals in the first action. Feig v. Bank of Italy, etc., Ass'n, 218 Cal. 54, 21 P.(2d) 421; Feig v. Bank of America, etc., Ass'n, 5 Cal.(2d) 266, 54 P.(2d) 3. The first trial of the first action was had upon the original pleadings. The original complaint in that action was in three counts which were described in Feig v. Bank of Italy, etc., Ass'n, 218 Cal. 54, 21 P.(2d) 421, 422, as follows: The first count was for money had and received; the second count was for the recovery of a deposit; and the third count was in ejectment for the recovery of two pieces of real property. The judgment of nonsuit which had been "granted primarily on the theory that plaintiff had misconceived his remedy and

should have alleged facts entitling him to equitable relief," was reversed with direction to permit the plaintiff therein to amend his complaint as indicated in the opinion. The court further indicated that plaintiff was entitled "upon amendment of the complaint, to receive such relief, either legal or equitable, as the evidence warrants."

An amended complaint was filed in the first action before the second trial. On the second appeal in said first action, the action was described as one brought "to impress a trust on certain real and personal property" and the judgment in favor of the plaintiff therein was affirmed. Feig v. Bank of America, etc., Ass'n, 5 Cal. (2d) 266, 54 P.(2d) 3, 4. No effort was made to fully describe the pleadings and judgment in that opinion as there were but two points raised on the appeal. The first point was "that the plaintiff was not entitled to anything" and the second point was that in any event the trial court erred "in awarding him anything in excess of fifty per cent" of the property.

[2] In the present case, the amended pleadings in the first action and the judgment entered upon the second trial thereof were attached to and made a part of the pleadings herein. Furthermore, the entire record upon the second trial of the first action was introduced in evidence. We may therefore look to these in order to determine whether "the issue in the first action was confined to the existence of the trust."

The amended complaint in the first action contained but one count. It alleged, among other things, the death of Mindell Feig and the appointment of the executors; the marriage of the plaintiff therein and Mindell Feig in 1889 and the accumulation of the real and personal property thereafter as a result of their efforts; the existence of an agreement that Mindell Feig should be the business head of the family and manage all properties acquired and the placing of the properties in her name pursuant to said agreement; the procuring of a divorce by Mindell Feig in 1890 without service of process and without the knowledge of plaintiff and plaintiff's living with Mindell Feig continuously in good faith believing himself to be her husband. The amended complaint further alleged that on or about the 1st day of August, 1929, defendants therein had taken possession of the real property and money referred to in said complaint and continued to hold the same and claim an interest therein and had refused to surrender said property to plaintiff upon demand; that the rental value of the real property was the sum of $78 per month during the period that defendants had withheld it; and that plaintiff had been damaged in the sum of $78 per month since August 1, 1929, by reason of said withholding. The prayer of the complaint was for a decree quieting plaintiff's title to the real property and money; for a judgment in the sum of $8,666.45 "with interest thereon"; for the "amount of rental value of said real property from the 1st day of August, 1929, until the entry of judgment" in the action and for "such other and further relief" as to the court seemed just.

The answer to said amended complaint contained certain denials, but admitted that defendants claimed an interest in the property as executors and affirmatively alleged that all of the property was the separate property of Mindell Feig at the time of her death and that she was the exclusive owner thereof. Defendants further denied that plaintiff had been damaged in the sum of $78 per month or any other sum by the withholding of the property. It was further alleged in said answer that plaintiff had no right, title, or interest in the real or personal property.

The trial court in that action found all of the material allegations of plaintiff's amended complaint to be true except that it found that the rental value of the real property was $70 per month and that plaintiff had been damaged in that amount per month by reason of the withholding. It further found that plaintiff was the owner of all the real and personal property and that the defendants had no right, title, or interest therein.

The judgment of the trial court in that action was as follows: (1) That plaintiff recover the sum of $8,666.45 with interest from August 1, 1929; (2) that plaintiff recover for the rental value "of the real property here involved from and after the 1st day of August, 1929, at the rate of $70 per month, or a total sum of $3,570.-00"; (3) that plaintiff Joseph Feig was the owner of all of the real property and entitled to possession thereof and that defendants had no right, title, or interest therein; and (4) that defendants had no right, title, or interest in or to "the sum of

$8,666.45 mentioned in the complaint" and had no right, title, or interest in the rents, issues, and profits of the real property.

[3, 4] We believe that it is apparent from what has been said that appellants' contention, that "the issue in the first action was confined to the existence of the trust and this was the only question litigated," is without merit. While the first action may be said to have been one in the nature of an action "to impress a trust" as stated in the opinion on the second appeal [Feig v. Bank of America, etc., Ass'n, 5 Cal.(2d) 266, 269, 54 P.(2d) 3, 4], it is certain that the amended complaint, filed after the first appeal, raised other issues and that the prayer asked for both legal and equitable relief. In fact, the allegations and the prayer thereof show that the plaintiff therein was seeking all of the legal and equitable relief to which he claimed to be entitled under the facts alleged. In addition to the allegations made to support his prayer for equitable relief, plaintiff alleged a refusal upon the part of defendants to surrender the real and personal property on demand. The allegations of the amended complaint were sufficient to put in issue plaintiff's right to damages for the alleged wrongful withholding of the real property and were also sufficient to put in issue his right to interest for the alleged wrongful withholding of the money. Cook v. Western Trust, etc., Bank, 137 Cal.App. 436, 30 P.(2d) 1006. The prayer of the amended complaint plainly asked for relief by way of a money judgment for such damages and for such interest. We therefore conclude that these issues were litigated in the first action, that the judgment in that action awarding plaintiff therein damages and interest was not "a judgment purporting to adjudicate a matter not within the issues" and that the plea of res judicata interposed by respondents in the present action was properly sustained by the trial court.

[5] In conclusion, we may state that appellants strongly insist that "the equities in the case are all in the bank's favor"; that it was in the position of a "successor trustee"; that it was its duty under the circumstances to resist the claims made by respondent Feig; and that it should only be held liable for the rents and interest which it actually received, less deductions for its expenditures. They cite and rely upon Elizalde v. Elizalde, 137 Cal. 634, 66 P. 369, 70 P. 861, but that case is not in point here. It is a sufficient answer to appellants' claims to point out that they should have been raised in the first action. It is a familiar maxim that "equity will not deal with a case by piecemeal" (10 Cal.Jur. 496), and it is a settled rule that it is "the duty of a court of equity, when all the parties to the controversy are before it, to adjust the rights of all and leave nothing open for further litigation" (Swan v. Talbot, 152 Cal. 142, 147, 94 P. 238, 240, 17 L.R.A.(N.S.) 1066; Spalding v. Spalding, 75 Cal.App. 569, 584, 243 P. 445). In the first action, the trial court followed the rule stated and entered a judgment which purported to settle all the issues raised and to settle all of the rights of the parties arising out of the subject-matter of the litigation. That judgment had become final before the commencement of this action. Appellants were seeking by this action to relitigate the issue of the amount owing to respondent Joseph Feig, but that could not be done as that issue had been fully litigated and determined in the first action.

The judgment is affirmed.

I concur: STURTEVANT, J.



HOLLAND v. KODIMER.*

Civ. 11385.

District Court of Appeal, Second District, Division 2, California.

June 8, 1937.

Rehearing Denied June 29, 1937.

Hearing Granted by Supreme Court Aug. 5, 1937.

1. Appeal and error ⇐761

Assignments of error in brief should take form of one or more stated propositions which, if sustained, would lend reasonable support to appellant's demand for reversal of judgment (Rules of Supreme Court and District Courts of Appeal, rule 8, § 2).

2. Appeal and error ⇐761

Counsel for appellant must comply with rule requiring each point in brief to be separately presented under appropriate heading, and reviewing court will not search record for errors not pointed out by counsel

*For subsequent opinion see 77 P.2d 843.

(Rules of Supreme Court and District Courts of Appeal, rule 8, § 2).

3. Appeal and error ⇐766

Where appellant's opening brief failed to present each point separately under an appropriate heading showing the nature of questions to be presented or points to be made, and failed to direct attention to any error of trial court, appeal was dismissed (Rules of Supreme Court and District Courts of Appeal, rule 8, § 2).

Appeal from Superior Court, Los Angeles County; H. Parker Wood and Robert W. Kenny, Judges.

Action by Robert F. Holland against M. C. Kodimer, wherein judgment was rendered for plaintiff. From an order denying defendant's motion to set aside and recall executions levied on the judgment, defendant appeals.

Appeal dismissed.

Irwin H. Roth, of Los Angeles (Horace W. Danforth, of Los Angeles, of counsel), for appellant.

H. A. I. Wolch and Thomas A. Reynolds, both of Los Angeles, for respondent.

McCOMB, Justice.

This is an appeal from an order denying appellant's motion to set aside and recall executions levied on a judgment obtained against him. Respondent has made a motion to dismiss the appeal.

This is the sole question necessary for us to determine:

Has appellant in his opening brief complied with the requirements of rule 8, section 2, of the Rules of the Supreme Court and District Courts of Appeal of the state of California by presenting each point separately under an appropriate heading showing the nature of the questions to be presented or the points to be made?

[1] This question must be answered in the negative. It is settled that to meet the requirements of rule 8, section 2 (Rules of the Supreme Court and District Courts of Appeal of the State of California, p. 10) the assignment of error must take the form of one or more stated propositions which, if sustained, will lend support to appellant's demand for a reversal of the judgment. Adams v. Standard Accident Insurance Co., 124 Cal.App. 393, 394, 12 P.(2d) 464; Graybeal v. Press-Telegram Publishing Co., 14 Cal.App.(2d) 252, 253, 57 P.(2d) 1343; Lady v. Smith (Cal.App.) 65 P.(2d) 76.

In the instant case the headings in appellant's brief are:

(1) STATEMENT OF THE CASE.
(2) ARGUMENT
Preliminary Statement.
(3) POINTS AND AUTHORITIES
Summary.

(4) I. The Levies of Execution Heretofore Made Herein Upon Property of the Appellant Are Null and Void, Being Premature and Without Authority of Law.

(5) II. Upon the Judgment Record in This Case, the Respondent Can Never Have Recourse Against the Appellant.

(6) Conclusion.

It is manifest that appellant has failed to meet the requirements of rule 8, section 2, supra. Thompson v. Municipal Bond Co. (Cal.App.) 68 P.(2d) 258.

[2, 3] This court has repeatedly held that it will not assume the task of searching the record for the purpose of discovering errors not pointed out by counsel, and in the present case appellant has failed to direct our attention to any error of the trial court. It is the duty of counsel to comply with the requirements of rule 8 in its entirety. Battson v. Kirkpatrick, 11 Cal.App.(2d) 283, 53 P.(2d) 762; Ferslew v. Andersen, 11 Cal.App.(2d) 400, 53 P.(2d) 768; Bernstein v. Congregation Anshi Sfart, etc., 14 Cal.App.(2d) 96, 57 P.(2d) 954. This rule is not a mere technical requirement, but is prescribed for the purpose of facilitating disposition of questions upon appeal and directing the court's attention to the specific errors of law alleged to have been committed by the trial court.

For the foregoing reasons the appeal is dismissed.

I concur: CRAIL, P. J.

21 Cal.App.2d 316

MAGERS et al. v. DELUXE WATER TAXI CO.

Civ. 1377.

District Court of Appeal, Second District, Division 2, California.

June 9, 1937.

Hearing Denied by Supreme Court Aug. 5, 1937.

Shipping ⇐166(4)

In action by passenger and her husband against operator of a water taxi for injuries sustained by passenger while attempting to board a naval vessel from water taxi, evidence *held* sufficient to support finding that passenger's injuries did not result from operator's negligence.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Cornelia C. Magers and another against the Deluxe Water Taxi Company. Judgment for the defendant, and the plaintiffs appeal.

Affirmed.

Will H. Winston, of Long Beach, for appellants.

George H. Moore and Gerald O'C. Egan, both of Los Angeles, for respondent.

McCOMB, Justice.

This is an appeal from a judgment in favor of respondent after trial before the court without a jury in an action to recover damages for personal injuries.

The essential facts are these:

Plaintiff, Cornelia Magers, the wife of her coplaintiff, Del Rey Magers, on August 3, 1935, was transported on a water taxi operated by defendant from the navy landing in Long Beach to the U. S. S. Saratoga anchored at Long Beach harbor. While endeavoring to board the U. S. S. Saratoga, she suffered personal injuries.

This is the sole question necessary for us to determine:

Is there substantial evidence to sustain the trial court's finding that plaintiff's injuries did not result from defendant's negligence?

This question must be answered in the affirmative. We have examined the record and are of the opinion there was substantial evidence considered in connection with such inferences as the trial court may have reasonably drawn therefrom to sustain the finding of fact set forth, supra, and each and every other material finding of fact upon which the judgment was necessarily predicated. We therefore refrain from further discussion of the evidence. Thatch v. Livingston, 13 Cal.App.(2d) 202, 56 P.(2d) 549: Koeberle v. Hotchkiss, 8 Cal.App.(2d) 634, 48 P.(2d) 104; Leavens v. Pinkham & McKevitt, 164 Cal. 242, 245, 128 P. 399.

The judgment is affirmed.

I concur: CRAIL, P. J.



21 Cal.App.2d 276

PEOPLE v. BOSSE.

Cr. 1545.

District Court of Appeal, Third District, California.

June 4, 1937.

1. Waters and water courses ⇐266

Evidence sustained conviction of breaking, injuring, and destroying a dam (Pen. Code, § 607).

2. Criminal law ⇐1134(2)

On appeal from conviction of destroying a dam, reviewing court cannot consider whether use of water was excessive or whether new construction added an increased burden to lands of defendant, such matters being determinable in a civil proceeding (Pen.Code, § 607).

3. Waters and water courses ⇐216

The statute providing that person who willfully and maliciously destroys any dam, reservoir, or other structure erected to create hydraulic power or to store excess water for agricultural purposes is guilty of a misdemeanor could be enacted under general police power of state, since public peace is paramount to any private right (Pen.Code, § 607).

4. Constitutional law ⇐87

The constitutional right to hold and enjoy property is subject to such reasonable regulations as are necessary to serve public health and morals and to promote common

good, and persons and property are subject to restraint to secure general welfare of state.

5. Criminal law ⇐304(2)

It is common knowledge that water and water rights have been the source of controversies between claimants thereto and that attempts to enforce alleged rights by force have led to disturbances of the peace.

6. Witnesses ⇐414(1)

Where during prosecution for destroying a dam, complaining witness was cross-examined whether district attorney in his capacity as private attorney ever handled complaining witness' affairs pertaining to diversion dam, and for purpose of impeaching witness, there was presented a letter from district attorney to defendant, it was proper to bring before jury fact that letter was written by district attorney in his official capacity, notwithstanding it was thereby made to appear that defendant had been convicted of misdemeanor (Pen.Code, § 607).

7. Criminal law ⇐719(1)

In prosecution for destroying a dam, it was improper for district attorney to state that defendant had been convicted of a crime, where record showed that there was a trial in justices' court but did not disclose whether defendant was ever convicted (Pen. Code, § 607).

8. Criminal law ⇐730(12)

In prosecution for destroying a dam, district attorney's improper reference to alleged previous conviction of defendant was not prejudicial, where court instructed jury to disregard objectionable remark, since court must assume that jury heeded admonition (Pen.Code, § 607).

9. Criminal law ⇐722(2)

In prosecution for destroying a dam, district attorney's alleged misconduct in stating to jury that defendant had flaunted law and law enforcement by going over head of district attorney and demanding jury trial and that district attorney would be guided in future by verdict of jury was not prejudicial (Pen.Code, § 607).

10. Criminal law ⇐719(1)

In prosecution for destroying a dam, argument of district attorney that he had seen methods of irrigation used by complaining witness but from what little experience he had could not say to complaining witness that ditch was too large or that amount of water taken was not necessary for irrigation of ranch, and that district attorney had advised defendant that he should get a court order, was not prejudicial, where only material fact was whether defendant had willfully destroyed the dam (Pen.Code, § 607).

Appeal from Superior Court, Calaveras County; J. A. Smith, Judge.

Henry E. Bosse was convicted of breaking, injuring, and destroying a dam, and he appeals.

Affirmed.

Joseph H. Huberty, of San Andreas, for appellant.

U. S. Webb, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Appellant was charged with the crime of breaking, injuring, and destroying a dam, an indictable misdemeanor, as defined by section 607 of the Penal Code. He was found guilty, and from the judgment entered thereon, prosecutes this appeal.

The grounds of appeal generally are insufficiency of the evidence to support the conviction and alleged misconduct of the district attorney.

Defendant, Bosse, is the owner of certain lands, riparian to the south fork of the Mokelumne river, which he has irrigated for many years, both under his riparian rights and under an appropriative right. The complaining witness, Eugene Fuchs, likewise owned lands riparian to said stream, immediately below the lands of Bosse. Some 7 acres of this land are irrigated under a right by appropriation, which is subordinate, both in point of time and law to the rights of Bosse.

The water used by Fuchs is diverted from the stream by means of a dam in the river located upon the lands of Bosse, and is carried from the dam by means of a ditch which extends from the point of diversion in a general westerly direction about ½ mile to the point of use.

This diversion dam was built in 1895 and consisted of a bottom log about 22 inches in diameter laid crosswise in the bed of the stream, and on top of this log was pinned a smaller log, which smaller log was from 6 inches to 10 inches in diameter. The bottom log at all times since has remained in

place. The top log remained in place until 1914 when it rotted out. It was immediately replaced by a similar log in a similar manner. This second log, during the winter of 1936, was washed out, and it was replaced by two timbers, a 4x6 and a 2x6 placed upon the bottom log. During the summer of 1936, Bosse removed these timbers.

It was his contention that prior to the placing of these two timbers on the top of the dam Fuchs had been diverting some 90 miners' inches of water, but by the addition of the planks 170 inches was then diverted. Bosse also contends that the complaining witness had never acquired a right to water in excess of 90 inches, and that even 90 inches was more than could be beneficially applied to the lands to which the water was diverted. He also claims that to increase the height of the dam was an invasion of his water right, added an increased burden to his lands, was contrary to law, and therefore he had a lawful right to remove such encroachment, and for that reason his conviction was erroneous.

Section 607 of the Penal Code reads in part as follows:

"Every person who willfully and maliciously cuts, breaks, injures or destroys any * * * dam, * * * reservoir, or other structure erected to create hydraulic power, or * * * to store or conduct water for * * * agricultural purposes * * * is guilty of a misdemeanor."

[1-3] It follows from the plain provisions of this act that we cannot herein consider whether the use of the water was excessive or whether the new construction added an increased burden to the lands of defendant. These are matters to be determined in a civil proceeding. It may have been that Bosse was only trying to protect his property against an unlawful invasion upon the part of Fuchs, but in summarily proceeding as he did he mistook his remedy. The public peace is paramount to any private right, and under the general police power of the state, such provisions as section 607 of the Penal Code may be enacted.

[4, 5] The constitutional right to hold and enjoy property is subject to such reasonable regulations as are necessary to serve the public health and morals and to promote the common good, and persons and property are subject to restraint to secure the general welfare of the state. It is common knowledge that water and water rights have been the source of controversies between claimants thereto and that attempts to enforce alleged rights by force have, in numerous instances, led to disturbances of the peace. That portion of appellant's brief, therefore, dealing with the wasteful use of water by the complaining witness, the rights of defendant as a riparian owner in the stream, and the change in the construction of the diversion dam, are all matters that should be addressed to a court in a civil proceeding and can have no bearing here on a charge of violation of the statute under review.

[6] Various citations of misconduct of the district attorney are made by appellant. The first assignment is that the district attorney was guilty of misconduct in stating, in his address to the jury, that defendant had been previously convicted of a crime, but no proof thereof is to be found in the record. It appears that during the trial the complaining witness was asked on cross-examination if Mr. Airola, as a private attorney as distinguished from his capacity as district attorney, ever handled any of the business affairs for him pertaining to the diversion dam, and for the purpose of impeaching him there was presented in evidence a letter from Mr. Airola to Bosse. This letter stated that Fuchs desired to do certain maintenance work on the diversion dam and asked permission to cross the lands of defendant.

Following a trial in the justices' court, on redirect examination, it was attempted to be shown that this letter was written by the district attorney in his official capacity in pursuance of an agreement made by the defendant and the complaining witness to the effect that in order to prevent a breach of the peace, the complaining witness would not enter upon the lands of the defendant to repair the dam without first notifying the district attorney. Under these circumstances, it was not improper to bring before the jury the facts surrounding the writing of the letter. The fact that it was thereby made to appear that defendant had theretofore been convicted of a misdemeanor would not make the letter inadmissible. People v. Maroni, 196 Cal. 154, 236 P. 135.

[7, 8] The record shows there was a trial in the justices' court, but whether defendant was ever convicted did not appear. It was improper, therefore, for the district attorney to state that defendant had been convicted. An objection was made by the attorney for the defendant to this statement, and the court instructed the jury to disregard the objectionable remark. We must

assume the jury heeded the admonition and no harm resulted from the remark.

In People v. Booth, 72 Cal.App. 160, 236 P. 987, the district attorney, in his address to the jury, referred to other crimes committed by the defendant. These remarks were stricken from the record by the trial court and it was held on appeal that under the circumstances and the convincing character of the evidence of guilt against the defendant, there was no miscarriage of justice. In People v. Jones, 78 Cal.App. 554, 248 P. 964, where the clerk inadvertently read to the jury from the indictment the allegations concerning a prior conviction of felony, the defendant having on arraignment, admitted such prior conviction, such error was not prejudicial. Likewise here we find no prejudicial misconduct nor miscarriage of justice.

[9] It is also claimed that the district attorney committed misconduct in stating to the jury the defendant had flaunted the law and law enforcement by going over the head of the district attorney and demanded a jury trial, and in stating to the jury that he, the district attorney, would be guided in the future by the verdict of the jury in this case. Likewise in this citation of misconduct we find no serious error.

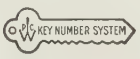
[10] Objection is also made to a portion of the argument of the district attorney, wherein it is charged he attempted to testify to certain facts, he not being sworn as a witness. The substance of these remarks were that he had gone upon the lands and saw the methods of irrigation used by the complaining witness, but from what little experience that he had in irrigation he could not say to Mr. Fuchs that the ditch was too large or that the amount of water taken was not necessary for the irrigation of the ranch.

Another instance was that the district attorney said that he, in the presence of the justice of the peace and a deputy sheriff, had advised the defendant that he had better get a court order if he thought he was in the right in removing the obstruction in the dam. The district attorney said that at that time nothing that they could do could deter Mr. Bosse from his intention of destroying the dam, and that Mr. Bosse had been unable to give a legitimate reason or show that his land was burdened by the repair work on the dam.

We cannot see wherein the statements herein made, whether proper or improper, can be deemed prejudicial. The only material fact before the jury was whether the defendant had willfully broken, injured, or destroyed the dam.

Finding no error resulting in miscarriage of justice, the judgment should be affirmed, and it is so ordered.

We concur: PLUMMER, J.; THOMPSON, J.



21 Cal.App.2d 208

BROWNFIELD v. McFADDEN et al.

Civ. 1650.

District Court of Appeal, Fourth District, California.

May 27, 1937.

Hearing Denied by Supreme Court July 26, 1937.

1. Executors and administrators ⇐169

Executor's pledge of irrigation district bonds, in which he invested estate funds pursuant to probate court order, obtained ex parte without statutory notice, as security for his note to minor's guardian for amount of loan evidenced by executor's previous note, secured by pledge of contract for sale of realty, after purchaser paid balance due and guardian released contract as authorized by court on condition, not complied with, that portion of purchase price be deposited in bank subject to court's further order, was illegal (Code Civ.Proc. §§ 1528, 1578).

2. Executors and administrators ⇐98, 99, 169

A probate court has no power to make ex parte order authorizing executor to borrow money, execute promissory note, and pledge assets of estate to secure it.

3. Contracts ⇐50

A contract is supported by sufficient consideration, if there is some benefit to promisor or detriment to promisee, regardless of amount thereof (Civ.Code, § 1605).

4. Contracts ⇐65(3), 71(3)

The cancellation of pre-existing debt and release of security therefor or forbearance to sue furnish sufficient consideration for contract, though it subsequently appears that forbearer might not have been successful in suit.

5. Executors and administrators ⇐99

Executor's execution of note, secured by irrigation district bonds belonging to estate, to minor's guardian for amount of loan evidenced by executor's previous note, secured by pledge of contract for sale of realty, after purchaser paid balance due and guardian released contract as authorized by court order on condition, not complied with, that portion of purchase price be deposited in bank subject to court's further order, was present completed compromise settling actual controversy between executor and guardian as to security for debt, and hence furnished consideration for note.

6. Trusts ⇐213

A testamentary trustee's moral obligation to repay amount loaned him by minor's guardian to pay antecedent debt of trust estate and administration expenses was sufficient consideration to support trustee's note to guardian for such amount, so as to render general assets of trust estate, which was enriched by loan, liable for payment of note and judgment thereon (Civ.Code, § 1606).

7. Executors and administrators ⇐99

A testamentary trust estate's use of money, loaned to executor by minor's guardian, who was permitted by probate court order, of which executor had actual notice, to release land sale contract, pledged as security for executor's note to guardian, on condition that portion of purchase price be impounded subject to court's order, was sufficient benefit to promisor to support executor's second note, secured by pledge of irrigation district bonds costing less than amount of loan; detriment to promisee being established by reduction in value of collateral pledged (Civ.Code, § 1605).

8. Trusts ⇐213

Testamentary trustee's note for amount loaned him by minor's guardian to pay antecedent debt of trust estate and administration expenses being legal obligation of such estate, exhaustion of security therefor was not necessary before bringing suit thereon.

Appeal from Superior Court, Orange County; Benjamin F. Warmer, Judge.

Action by Robert Todd Brownfield, a minor, by and through H. J. Brownfield, guardian of his person and estate, against E. T. McFadden, as trustee of the trust estate of Otto S. Lewis, deceased, Homer L. Lockwood, and others. From a judgment for plaintiff, defendants Lockwood and others appeal.

Affirmed.

Forgy, Reinhaus & Forgy, of Santa Ana (A. M. Bradley, of Santa Ana, of counsel), for appellants.

Launer & Thompson, of Fullerton, and Drumm, Tucker, Martell & Drumm, of Santa Ana, for respondent.

MARKS, Justice.

This action was instituted to recover from a trust estate, of which E. T. McFadden is trustee, the sum of $18,000, besides interest, costs, and attorneys' fees. The plaintiff had judgment as prayed for and certain of the defendants have appealed. For a proper understanding of the reasons for the conclusions reached by us it is necessary to detail many of the involved facts disclosed by the record.

H. J. Brownfield has been and is the duly appointed, qualified, and acting guardian of the person and estate of Robert Todd Brownfield, a minor. Between January 3, 1927, and March 30, 1931, Reeves Aylmore was executor of the last will and testament of Otto S. Lewis, deceased. Between the last-mentioned date and about October 14, 1932, Aylmore was trustee of a testamentary trust created by the last will and testament of Otto S. Lewis, deceased, and established in the decree of distribution of his estate. On October 14, 1932, E. T. McFadden was appointed trustee of the trust estate in the place of Reeves Aylmore. The other appellants are beneficiaries of the trust.

On July 25, 1930, Aylmore secured an order from the probate court permitting him to borrow $18,000 to pay debts of the estate, expenses of administration, and past-due legacies. This order was amended on August 4, 1930. It directed Aylmore, as executor, to execute a promissory note for $18,000, due in three years, with interest at a rate not to exceed 7 per cent. per annum payable semiannually, and to provide that in case suit should be brought on the note the plaintiff might recover reasonable fees for his attorneys. It was also provided that there be pledged as security for the loan a contract for the sale of real estate dated June 14, 1916, wherein Otto S. Lewis was the seller and Charles H. Stanley the buyer and upon which there was an unpaid principal bal-

ance of about $48,000. H. J. Brownfield as guardian secured an order permitting him to make the loan upon the terms and with the security just mentioned. Aylmore as executor executed the note, secured by a pledge of the contract, and received the $18,000 which went into the funds of the estate.

About November 17, 1930, Stanley elected to pay the balance due on his contract of purchase. The guardian, at the request of Aylmore, petitioned the probate court for authority to release the contract. This permission was granted upon the condition that $18,000 of the purchase price be deposited in a bank and there remain intact subject to further order of the court. While Aylmore was not a party to this proceeding he had actual knowledge of it and of the terms of the order. Aylmore collected in excess of $46,000 from Stanley, which was all deposited in the executor's general account about December 18, 1930. At no time was $18,000, or any part of it, segregated as contemplated in the order.

On December 18, 1930, Aylmore filed his petition to invest $18,000 of the estate funds in Vista irrigation district bonds and to use these bonds as security for the $18,000 note. The order permitting this to be done was filed the same day. The proceeding was ex parte and no notice was given as required by sections 1528 and 1578 of the Code of Civil Procedure, in effect at that time. In his petition Aylmore alleged that he had investigated the financial condition of the Vista irrigation district and found it good. In the prayer of the petition he requested authority to use estate funds not to exceed the sum of "$18,000.00 for the purpose of purchasing the bonds of the Vista Irrigation District at the market price amounting to $18,000.00 par." The petition was carefully drawn with the evident purpose of conveying the impression that the bonds were worth their par value, which was then their market price, and of concealing the fact that they were then selling on the market for considerably less than par. Aylmore paid $15,584.71 for the bonds, according to the admission of the pleadings. However, in his final account he set forth the amount of the payment as $13,820. The trial court found that these bonds had a market value of not more than $9,000 at the time of the trial.

Neither the guardian nor his attorney had any knowledge or notice of this proceeding. The first intimation either had of it was when Aylmore appeared in the office of the attorney for the guardian with the bonds and stated to him that the probate court had made an order releasing the $18,000 segregated in the bank, directing that it be invested in the bonds and that the bonds be delivered as security for the $18,000 loan. The attorney objected to receiving the bonds as security for the note and demanded additional collateral which Aylmore promised to furnish. With that understanding the attorney received the bonds. While the record is not entirely clear on that question it seems probable that another executor's note was prepared and executed at that time in which the bonds were described as collateral security. We will assume that such second note was given. It does not appear that the attorney for the guardian then knew that the order of December 18, 1930, had been obtained ex parte and without conforming to the requirements of sections 1528 and 1578 of the Code of Civil Procedure.

After the attorney for the guardian learned that a decree of distribution had been rendered in the estate of Lewis he requested additional security from Aylmore, who was then the trustee of the trust estate. This attorney requested the additional security that had been promised and also that Aylmore, as trustee, execute a new note. Aylmore agreed to give as additional collateral a note of Knute B. Norswing and Gunhild Norswing upon which there was an unpaid principal of about $33,000. This note belonged to the trust estate and was secured by a mortgage on land in the state of Oregon. The guardian secured permission of the probate court to accept the new note of the trustee with the Vista irrigation district bonds and the Norswing note and mortgage as collateral.

Shortly thereafter the attorney for the guardian again interviewed Aylmore and had with him a form of note describing as collateral the bonds and the Norswing note and mortgage. Aylmore agreed to execute the note as trustee and give the bonds as collateral but said he could not deliver the Norswing note and mortgage at that time. The description of the Norswing note and mortgage was eliminated

from the note which was then executed by Aylmore as trustee. Default was made in the payments of interest and the principal of this note and this action followed.

The powers, pertinent to this appeal, given to the trustee in the decree of distribution, are thus set forth: "In further trust with full power and authority to hold, manage, care for, transfer, hypothecate, encumber, invest, re-invest, sell, convey, handle and dispose of all of said property for the purpose of carrying out the purposes of said trust."

It is not seriously contended by appellants that these powers do not include authority to execute a promissory note for the amount of a pre-existing debt and pledge property of the trust estate as security for the payment of such note.

The note given by the trustee differed from the first and second executor's notes only in the date and in the collateral security described in it which was pledged to secure it, and in the signature of Aylmore as trustee instead of executor.

The contention of appellants is thus set forth in their brief: "The evidence shows without dispute that the loan of $18,000.00 by the plaintiff to the estate of Otto S. Lewis was secured by a pledge of specific personal property and was enforceable against this property only. The evidence likewise shows without dispute that the plaintiff through his guardian was entitled to collect the entire proceeds of the pledge and retain in his hands sufficient money therefrom to discharge his obligation, but that the plaintiff instead permitted the investment of his share of the proceeds in certain bonds which he retained as a pledge. It is submitted, therefore, that the note executed by Aylmore as trustee of the estate of Otto S. Lewis was without consideration and that the plaintiff is entitled to the 18 Vista Irrigation bonds only and that the court erred in giving the plaintiff judgment for the sum of $23,918.50, payable out of all the assets of the trust estate."

Various questions are vigorously argued by the parties, such as the validity of the second executor's note and the validity of the pledge of the bonds to secure it, as well as the general liability of the estate of Lewis (not the trust estate) for a deficiency remaining after the security given for the executor's notes had been exhausted. See sections 1528 and 1578, Code Civ.Proc. Were this an action on either of these notes such arguments would have compelling force. It is not such an action. It is an action on a note given by the trustee after the assets of the estate had been delivered to him under the decree of distribution. In the last analysis the controlling question here is the consideration, or lack of it, given for the trustee's note. The prior transactions of the parties during the administration of the Lewis estate are only important as they bear on that question.

It is not questioned that the original executor's note with the pledge of the Stanley contract was duly authorized and formed a valid obligation of the estate of Lewis. The guardian paid Aylmore as executor the full amount of the loan and Aylmore accounted for it. The trial court found that all of the $18,000 went into the Lewis estate and became a part of it. $10,000 went to pay a prior indebtedness of that estate and $7,500 to pay expenses of administration. As far as the record discloses, the balance of $500 remained in the general assets of the estate and passed into the trust fund on distribution. It is admitted that no interest was paid since some time in 1932 and that the total amount of the principal remains unpaid. The finding that the Vista irrigation district bonds had a market value of not more than $9,000 at the time of the trial is not questioned.

If we correctly understand the parties they do not seriously question the right of the plaintiff to recover something on the indebtedness. They differ sharply as to the source of the funds to be applied on the debt. The appellants maintain that the only fund available for this purpose is that to be derived from the sale of the bonds. They do not question the amount of the judgment as representing the amount of the original loan and interest, but object to its being recovered in full from the general assets of the trust estate. Respondent seeks to maintain the judgment in its entirety as collectable from the trust funds.

[1, 2] While appellants insist that the plaintiff must be satisfied with the amount he may recover by the sale of the Vista irrigation district bonds, neither party very seriously argues that the transaction which resulted in giving the second executor's note secured by the pledge of the bonds was legal. In this conclusion we are constrained to agree. Too many of the

necessary steps required by law to permit an executor to pledge estate property were omitted. Sections 1528, 1578, Code Civ. Proc. Certainly a probate court does not have power to make an ex parte order authorizing an executor to borrow money, execute a promissory note, and pledge an asset of the estate to secure it. Such procedure is not authorized by law. The guardian was not authorized by any order to accept this executor's note secured by a pledge of the bonds. The last authority given him prior to the date of the second note was to surrender the Stanley contract for collection on condition that the executor deposit in an authorized bank the sum of $18,000 to be collected on the Stanley contract, there to be held subject to further order of court.

We must proceed to the legal question of consideration, if any, for the executor's note. It is evident that if there was a valid consideration for it the judgment should be affirmed, otherwise it must be reversed.

[3, 4] A contract is supported by a sufficient consideration if there is some benefit to the promisor or detriment to the promisee regardless of the amount of the benefit or detriment. Section 1605, Civ. Code ; 6 Cal.Jur. 168; 6 Ten-Year Supp. 73-4. The cancellation of a pre-existing debt, the release of security or the forbearance to sue, even though it subsequently appear that the forbearer might not have been successful in the suit, furnish sufficient consideration to uphold a contract. 6 Cal.Jur. 172-3, and cases cited; cases cited in 6 Ten-Year Supp. 74-5. These rules are too firmly established in California to need further citation of authority.

[5] The permission of the probate court given to the guardian to surrender the Stanley contract for the purpose of collection was made upon the express condition that $18,000 of the amount collected by the executor be segregated and deposited in a bank and there held subject to further order of the court. While the executor was not a party to this proceeding, he had knowledge of the terms of the order. The estate accepted the benefit of the order and should have performed the condition. As it did not do so the guardian might have instituted an action to restore the security or the money into which it had been converted, or so much of it as might have been deemed necessary to secure the note. We are not so much concerned with the probable success of such an action as in the fact that some such proceeding might have been instituted in good faith by the guardian. The executor had committed a wrong which injured the estate of the minor and for this wrong there should have been a remedy. There was no agreement to forbear such a suit, but there was an actual controversy between the parties which might have resulted in litigation. The guardian at all times demanded ample security for the loan. The executor promised to furnish such security but did not do so. His duplicity deceived not only the guardian and his attorney but also the probate court. That there was a real controversy between the parties over the security to be given for the debt seems too clear to permit of doubt. This controversy was finally settled, temporarily at least, by the trustee giving the note in question here, secured by the Vista irrigation district bonds. That this was only a temporary compromise of the dispute seems evident from the fact that Aylmore agreed to furnish additional security, the Norswing note and mortgage, in about six months. Nevertheless, it was a present completed compromise that settled an actual controversy between the parties and as such furnished consideration for the note.

[6] Section 1606 of the Civil Code provides as follows: "An existing legal obligation resting upon the promisor, or a moral obligation originating in some benefit conferred upon the promisor, or prejudice suffered by the promisee, is also a good consideration for a promise, to an extent corresponding with the extent of the obligation, but no further or otherwise."

This section has been invoked principally to sustain a promise to pay a debt barred by the statute of limitations or discharged by proceedings in insolvency. Chabot v. Tucker, 39 Cal. 434; Lambert v. Schmalz, 118 Cal. 33, 50 P. 13; Ferguson v. Larson, 139 Cal.App. 133, 33 P.(2d) 1061. The rule of the section has been extended beyond those cases in which it has been so applied.

In Estate of McConnell, 6 Cal.(2d) 493, 58 P.(2d) 639, 642, it is said: "California cases have construed said code section to mean that 'a moral obligation is sufficient to support an express promise, where a good and valuable consideration has once

existed.' 6 Cal.Jur. 181, § 124; Sullivan v. Sullivan, 99 Cal. 187, 33 P. 862; Peek v. Peek, 77 Cal. 106, 19 P. 227, 1 L.R.A. 185, 11 Am.St.Rep. 244; McCormick v. Brown, 36 Cal. 180, 95 Am.Dec. 170; Southern Pacific Co. v. Prosser, 122 Cal. 413, 52 P. 836, 55 P. 145; Bickerdike v. State, 144 Cal. 681, 78 P. 270; Pacific Rys. Adv. Co. v. Carr, 29 Cal.App. 722, 157 P. 529; Royer v. Kelley, 174 Cal. 70, 161 P. 1148; 13 Cor.Jur. 360."

See, also, Bernstein v. Downs, 112 Cal. 197, 44 P. 557; Bank of Yolo v. Bank of Woodland, 3 Cal.App. 561, 86 P. 820; Carrington v. Smithers, 26 Cal.App. 460, 147 P. 225.

The rule established by that section would seem to be applicable here. There was at one time a valid and binding promise on the part of the executor to repay the loan, which promise was secured by ample security. Whether or not the benefit of the security was lost largely through the manipulations of the executor, we need not decide. Both parties seem to accept that view in some of the arguments in their briefs.

The facts of this case would seem to bring it within the spirit of the section. The full sum of $18,000 was paid by the guardian to the executor and by him placed among the assets of the estate. The trust fund was enriched by that amount, for if all or nearly all of that money had not been used to pay an antecedent debt and expenses of administration, other estate funds would have been used for those purposes. As the trust estate has been thus enriched by the loan, it would seem there should be a moral obligation on its part to repay the loan, which should be sufficient consideration to support the note of the trustee given for the prior debt. If this is true the general assets of the trust estate should be held liable for the payment of the note and the judgment upon it.

[7] If we should adopt the theory that the execution of the second executor's note and the pledge of the Vista irrigation district bonds was a void transaction because it was not authorized by any order of court, and there are strong arguments in support of such conclusion, it would follow that there was ample consideration to support the trustee's note and pledge of the bonds. As we have observed, the order permitting the guardian to release the Stanley contract was made on the condition that $18,000 collected by the executor on the Stanley contract be impounded subject to the order of the court. The executor had actual notice of this order and the estate should not be permitted to accept its benefits and escape its burdens. Instead of the $18,000 in cash to be held as security for the note, the trustee was permitted to substitute bonds that cost at least $2,415.29 less than $18,000. Thus the estate and the trust had the use of that amount of money which is a sufficient benefit to the promisor to support the new contract. A detriment to the promisee is established by the reduction in the value of the collateral pledged to secure the indebtedness.

[8] As the note of the trustee is a legal obligation of the trust estate it was not necessary for plaintiff to exhaust the security before bringing suit upon it. Commercial Sav. Bank v. Hornberger, 140 Cal. 16, 73 P. 625; Baird v. Olsheski, 116 Cal.App. 109, 2 P.(2d) 493.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.



21 Cal.App.2d 138

BUREAU OF WELFARE, CALIFORNIA TEACHERS' ASS'N, SOUTHERN SECTION et al. v. DRAPEAU, Building and Loan Com'r.

Civ. 10510.

District Court of Appeal, First District, Division 2, California.

May 25, 1937.

1. Building and loan associations ⇐42(19)

Agreement between teachers' welfare bureau and building and loan association for purpose of building home for retired teachers, whereunder teachers made monthly payments to be credited to bureau's special account and received interest-bearing investment certificates therefor, which was to be construed according to building and loan association statutes, did not create trust, but gave teachers same status as ordinary investors, and hence teachers and bureau were not entitled to preference among association's creditors.

2. Building and loan associations ⇐42(17)

Under agreement whereby building and loan association would return entrance fees to joint investors if there were no withdrawals among joint investors within 48 months, investors were entitled to return of entrance fees when association became insolvent within 48 months without any withdrawals having occurred.

3. New trial ⇐164

The court has broad powers under statute to change findings and modify judgment, to be exercised in conjunction with ruling upon motion for new trial when new trial is unnecessary, in which event motion for new trial will be denied (Code Civ.Proc. § 662; § 663, as amended by St.1933, p. 1881, § 120).

4. New trial ⇐164

An order providing that motion for new trial should be granted in part and that judgment should be amended was proper as constituting in substance an amendment of judgment as alternative to granting motion for new trial, as authorized by statute (Code Civ.Proc. §§ 656, 662; § 663, as amended by St.1933, p. 1881, § 120).

5. Appeal and error ⇐1072

Error in signing amended findings and entering amended judgment after having allegedly granted new trial was not prejudicial, where only issues involved were of law and record showed that new trial would have had same result as amended judgment (Code Civ.Proc. § 662; § 663, as amended by St.1933, p. 1881, § 120; Const. art. 6, § 4½).

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by the Bureau of Welfare, California Teachers' Association, Southern Section, and others against Louis C. Drapeau, as Building and Loan Commissioner of the State of California, in the liquidation of North American Building-Loan Association (substituted as defendant for Friend W. Richardson, as Building and Loan Commissioner of the State of California). From the original judgment, defendant appeals; and from the amended judgment, both parties appeal.

Appeal from original judgment dismissed, and amended judgment affirmed.

Tanner, Odell & Taft, of Los Angeles, for appellant.

James C. Ingebretsen, of Los Angeles, for respondents.

SPENCE, Justice.

Plaintiffs filed a complaint entitled "Complaint for declaratory relief, to declare a trust and to recover trust funds." They sought thereby to obtain a declaration of their rights with respect to certain funds deposited with the North American Building-Loan Association prior to the taking over of said association by the defendant building and loan commissioner; to have it declared that said funds were held "in trust and as a preferred claim * * * to be paid before any other claims"; and to have the commissioner directed "to pay over said sums in full to plaintiffs with interest and without any deduction." The original judgment, entered herein on September 3, 1935, was in favor of plaintiffs.

Defendants took an appeal from said original judgment and also made a motion for new trial. The minute order showing the ruling on said motion reads as follows: "Motion of defendant for new trial submitted on October 15, 1935, is now granted in part and findings and judgment ordered amended (see memorandum of opinion on file)." The memorandum of opinion referred to in said order reads as follows:

"On motion for new trial. Further consideration of the issues in this case lead the Court to the conclusion that judgment was erroneously entered for plaintiffs upon the point as to the creation of a special trust fund in favor of plaintiffs. Consideration of the agreement in question, and especially of the provisions of the building and loan statutes, would indicate that plaintiffs are in no different or better position in that regard than are the other applicants and purchasers of 'Investment Savings Certificates.'

"The motion for new trial is therefore granted as to that point: to-wit, as to the status of the fund, and the findings and judgment herein will be changed and amended accordingly to conform to the views herein expressed and against the trust fund theory.

"Upon other points and as to other findings the motion is denied and the judgment will remain."

Thereafter amended findings of fact and conclusions of law were signed and an amended judgment was entered on November 16, 1935. The amended findings of fact and conclusions of law differed from those previously signed in that the trial court

found and concluded "that none of the money deposited by any of the plaintiffs is held in trust by the loan association or the commissioner and the court finds that the action of defendant commissioner in approving the claims of plaintiffs for payment upon the same basis and in the same proportion as the claims of other creditors and investment certificate holders and not otherwise was proper and correct." It further concluded that defendant was "not entitled to deduct an entrance fee in the sum of $10.00 or any entrance fee whatever, from the monies deposited by any of the plaintiffs, or to deduct anything on that account." The amended judgment was entered accordingly. Plaintiffs made a motion to set aside the amended judgment, claiming it was void. Plaintiffs also made a motion under section 663 of the Code of Civil Procedure, as amended by St.1933, p. 1881, § 120, to set aside the amended judgment and to enter another and different judgment. In addition thereto, plaintiffs made a motion for a new trial. All of said motions were denied.

Plaintiffs have appealed (1) from the portion of the amended judgment reading, "That the claims of said plaintiffs and each of them be approved for payment upon the same basis and in the same proportion as the claims of other creditors and investment certificate holders and not otherwise"; (2) from the order denying their motion to set aside the amended judgment as void; and (3) from the order denying their motion under section 663 of the Code of Civil Procedure, as amended, to set aside the amended judgment and to enter another and different judgment. Defendant took an appeal from the whole of the amended judgment, but it appears from the briefs that defendant is satisfied with said judgment except in so far as it denied to defendant the right to deduct an entrance fee of $10 from the claim of each of the plaintiffs. The three appeals taken by plaintiffs and the two appeals taken by defendant are presented together in one set of briefs. We shall refer to the parties as plaintiffs and defendant throughout this discussion.

Before taking up the procedural points raised, we shall discuss the questions which appear to be determinative of the main controversy on the merits. Plaintiff Bureau of Welfare, California Teachers' Association, Southern Section, is a corporation whose principal object is to provide for the welfare of retired teachers. The remaining plaintiffs are members of that association who had made deposits with the North American Building-Loan Association pursuant to applications and agreements similar to the one hereinafter set forth. The plan of the Bureau of Welfare sufficiently appears from the recitals found in said application and agreement. We deem it necessary to set forth in full said application and agreement as the main question on this appeal involves the construction placed thereon by the trial court. We have added the letters in parenthesis at the beginning of the paragraphs in order to facilitate reference to the various provisions. The application and agreement of plaintiff Frederick F. Martin was executed on November 17, 1928, and read as follows:

"Read and Understand This Application Thoroughly Before Signing.

North American Building-Loan Association
Under State Supervision
712 South Grand Avenue
Los Angeles, California
TRinity 4416

(A) "This Application and Agreement, made by and between Frederick F. Martin, Santa Monica, Calif., hereinafter designated as the 'Applicant', party of the first part, North American Building-Loan Association, hereinafter designated as the 'Loan Association,' a corporation having an office in the City of Los Angeles, State of California, party of the second part, and Bureau of Welfare, California Teachers' Association, Southern Section, hereinafter designated as the 'Bureau of Welfare,' a California Corporation, party of the third part;

"Witnesseth:

(B) "Whereas, Bureau of Welfare, aforesaid, has plans for establishing a home to properly care for its members and is desirous of accumulating a fund for the purpose of acquiring land, buildings and equipping and maintaining said home, and the Applicant being one of other applicants who shall execute identical applications with this, is desirous of assisting in the accumulation of said fund by investing in certificates of the Loan Association aforesaid, known as Investment Saving Certificates, for the benefit of himself and the Bureau of Welfare;

"Now, therefore, it is mutually agreed as follows:

(C) "1. The Applicant hereby applies to said Loan Association for an Investment Saving Certificate with maturity value of One Thousand Dollars ($1,000.00), and agrees to make monthly payments to said Loan Association of Five Dollars ($5.00)

per month for a period of forty-eight (48) Months on said Certificate.

(D) "All said payments shall be credited to an account entitled Bureau of Welfare Account, subject to the provisions of this Agreement, and the Applicant hereby releases and quitclaims all his right, title and interest in and to all monies paid in by him up to and including one-half of the first $240.00, with accrued interest and accumulations on $240.00 in this account, and agrees that the same shall be paid over to the said Bureau of Welfare to be used by it for the purposes above set forth.

(E) "It is further agreed that the money so paid in by said Applicant shall accumulate until said Forty-eight Monthly payments shall have been made, at which time there shall be paid over by said Loan Association to said Bureau of Welfare One Hundred Twenty Dollars ($120.00), together with all interest and accumulations on Two Hundred Forty Dollars ($240.00) during the period of Forty-eight Months aforesaid, and the Applicant shall receive a Prepaid Investment Certificate for One Hundred Twenty Dollars ($120.00), which shall mature ten years from its date of issue and have a maturity value of Two Hundred Forty Dollars ($240.00), it being understood that said Certificate may be cashed in prior to the said term of ten years from its date of issue in accordance with the terms set forth in such Certificate. It is also understood that the Applicant, in lieu of taking the aforesaid Prepaid Investment Certificate for One Hundred Twenty Dollars ($120.00), shall have the right to leave said amount so paid in with said Loan Association and continue thereafter to make monthly payments to said Association of Five Dollars ($5.00) per month until said One Hundred Twenty Dollars ($120.00) and said monthly payments together with interest at Six Per Cent (6%) per annum compounded monthly totals One Thousand Dollars ($1,000.00). Withdrawal may be made at any time as provided by law.

(F) "It is further understood that in case Five Hundred (500) applications identical with this application, except as to date and name of Applicant, shall not have been obtained before October 1, 1932, the said Bureau of Welfare will transfer and quitclaim back to this Applicant all its right, title and interest in and to any of the funds deposited and accumulated and the Applicant shall thereupon be entitled to receive all of said money paid in by said Applicant, together with all interest earned thereon, less an entrance fee of One Per Cent of the maturity value of the Investment Saving Certificate for which this is an application, in accordance with law.

(G) "It is understood that this application is made subject to the charter and by-laws of said Loan Association and Section 642 of the Civil Code of the State of California.

(H) "The Applicant shall make payment to the Loan Association by check, draft or money order payable to North American Building-Loan Association, or by cash, at the office of the Association in Los Angeles, California, either in person or by mail.

(I) "2. The Loan Association after 500 applications identical with this application, except as to name of Applicants and date, shall have been received shall thereafter hold all payments in said account for the use and benefit of Applicant and of the Bureau of Welfare aforesaid, and the Bureau of Welfare may withdraw the funds accumulated at any time which have been herein assigned to it under the provisions of Section 642 of the Civil Code, up to one-half of the total amount paid in by the Applicant, plus accrued interest upon the amounts paid in, but in no event shall it withdraw more than the sum of $120.00 plus accrued interest on $240.00.

(J) "It is understood that this Agreement may be terminated by the mutual consent of the Applicant and of the Bureau of Welfare at any time, and that it shall be terminated on October 1, 1932, unless before that time 500 applications identical with this application, except as to name of Applicant and date, shall have been obtained.

(K) "3. Nothing in this Agreement shall be deemed to create any liability on the part of said Loan Association except to handle and care for and pay over the money so paid in according to the terms of this Agreement and in accordance with the laws of the State of California governing building and loan associations. It will from time to time or on demand, render a statement of this account to the Applicant and to the Bureau of Welfare.

(L) "4. In consideration of securing these accounts and applications the Loan Association agrees that no charge whatever shall be made for any service performed by it except the Entrance Fee of One Per Cent herein mentioned, which it may retain in the event a withdrawal is made prior to the maturity of the Certificate issued to the Applicant at the end of said term of Forty-eight Months; and it agrees that all monies

paid to it on this application shall bear interest at the rate of six percent per annum compounded monthly on all monthly payments made by said Applicant. It agrees also, that the prepaid Investment Saving Certificate to be issued to said Applicant as herein provided, shall bear interest at the rate of Seven Per Cent per annum compounded semi-annually until said Certificate shall have matured at the end of Ten Years to the sum of $240.00.

(M) "4. Should the Applicant die before the said period of Forty-eight Monthly payments shall expire, then and in that case all money paid in up to the sum of $240.00 by said Applicant, with the accumulated interest thereon, shall be subject to withdrawal as follows: One-half, plus all accumulated interest, by the Bureau of Welfare aforesaid, and the other half of principal by the administrator, executor or heirs of the Applicant in the manner provided by law.

(N) "5. The Bureau of Welfare agrees on its part that unless 500 applications, identical with this application except as to name of Applicant and date, shall have been received by said Loan Association prior to October 1, 1932, it will forthwith quitclaim and assign to the Applicant all its interest in any fund deposited or paid in by said Applicant, including the accumulations thereon.

(O) "Said Bureau of Welfare further agrees that it will use all money received under this Agreement for the purpose of acquiring land, erecting buildings, and equipping and maintaining the same for a home for the members of the Bureau of Welfare, California Teachers' Association, Southern Section; and that should it fail so to do within Five Years after October 1, 1932, it will return and pay to said Applicant, his or her heirs, administrators, or executors, the sum received by it through and under this Agreement. It is understood that the consideration of this Agreement as between Applicant and the Bureau of Welfare is a mutual contribution of at least 500 applicants under identical contracts, except as to names of applicants and dates, for the purposes herein set forth.

(P) "6. This Agreement shall inure to the benefit of and be binding upon the heirs, administrators, executors and assigns of the parties hereto. It shall be signed in triplicate by all the parties hereto, and one copy thereof shall be retained by the Applicant, one copy delivered to the Bureau of Welfare, and one copy filed with the said Loan Association."

On April 1, 1932, defendant directed the building and loan association to refrain from accepting further deposits of any kind, and on July 8, 1932, said defendant demanded and took possession of property, business, and assets of said association under the authority vested in him by section 13.11 of the Building and Loan Act (Stats.1931, p. 539). Prior to that time, said Frederick F. Martin and 467 other persons including all the plaintiffs herein, had executed applications and agreements similar to the one above set forth.

[1] It appears from what has been said that plaintiffs were seeking by this action to obtain a preference in the liquidation of the building and loan association over other investors in said association. They claimed that by reason of the terms of said applications and agreements, the association held their deposits "in trust for the bureau of welfare and the applicants," and their main contention on this appeal is that amended findings to the contrary are not sustained by the evidence. We are of the opinion that there is no merit in this contention.

We find nothing in said applications and agreements to show that a trust relationship was intended between the plaintiffs and the building and loan associations as to deposits made thereunder but on the contrary, there are many provisions found therein which show that no trust relationship was intended. The main purpose of the instruments executed by plaintiffs was obviously to define the rights of the several plaintiffs among themselves and between themselves and the Bureau of Welfare. The further purpose of the instruments was to serve as applications to the building and loan association for investment saving certificates under certain terms and conditions including an option to be exercised after 48 monthly payments had been made. In the heading the instrument was referred to as an "application" and in paragraph (A), it was referred to as an "application and agreement"; in paragraph (B) it was recited that the applicant was one of several applicants who was desirous of accumulating a fund "by investing in certificates of the Loan Association aforesaid, known as Investment Saving Certificates"; in paragraph (C), the applicant applied for an "Investment Saving Certificate"; in paragraph (G), it was stated, "It is understood that this application is made subject to the charter and by-laws of said Loan Association and Section 642 of the Civil Code of the State of California"; in paragraph (I), the withdrawal of funds

by the Bureau of Welfare was made subject to the last-mentioned section of said Civil Code and in paragraphs (E), (F), and (M), it was provided that withdrawals could be made only "as provided by law" or "in accordance with law" or "in the manner provided by law"; in paragraph (K) it was specifically provided that nothing in the agreement should be deemed to create any liability on the loan association except to handle the money "according to the terms of this Agreement and in accordance with the laws of the State of California governing building and loan association"; in paragraph (L), it was provided that "all monies paid to it on this application shall bear interest at the rate of six per cent per annum compounded monthly on all monthly payments made by said Applicant," and there were other provisions regarding interest in said paragraph and also in paragraphs (E) and (F). These provisions clearly indicate that, except in certain details required by the agreement between the applicants and the Bureau of Welfare, the relationship of the building and loan association to the plaintiffs was to be in all respects similar to its relationship to other investors; that it was to have the right to the unrestricted use of the funds deposited and was to pay interest for that use; that the right to withdraw any part of said funds was to be the same as the right of investors generally as provided by section 642 of the Civil Code; and that only such liabilities were to be incurred by the building and loan association as were provided in the agreement "and in accordance with the laws of the State of California governing building and loan association." In view of these features contained in said instrument, we do not deem it necessary to discuss the authorities cited by plaintiffs as we find none in point. We conclude that the instrument before us shows that no trust relationship was intended or created and that the trial court properly so found and concluded in its amended findings of fact and conclusions of law.

[2] On defendant's appeal from the amended judgment, it is contended that the trial court erred in not deducting the sum of $10 as an "entrance fee" from the amount for which the claim of each plaintiff was approved. We find no merit in this contention. In the present case, the application and agreement specifically provided for the conditions under which an entrance fee would become due from the applicant. These conditions were contained in paragraphs (F) and (L). The building and loan association went into liquidation several months prior to October 1, 1932, the time fixed in paragraph (F) for obtaining 500 applications. There were no withdrawals by any of the plaintiffs prior to the time fixed in paragraph (L). Under these circumstances, no entrance fee was due to the building and loan association and there was no error in the trial court's ruling on this point.

The procedural points raised by plaintiffs involve the propriety of the trial court's order in ruling upon the motion for new trial and the propriety of the trial court's action in signing amended findings and entering an amended judgment after making said order. The order made in ruling upon the motion for new trial is hereinabove set forth in full as is also the memorandum of opinion filed therewith which was incorporated by reference in said order. The trial court was obviously seeking to exercise the powers granted to it under section 662 of the Code of Civil Procedure. Said section reads as follows: "In ruling on such motion, in a cause tried without a jury, the court may, on such terms as may be just, change or add to the findings, modify the judgment, in whole or in part, vacate the judgment, in whole or in part, and grant a new trial on all or part of the issues, or, in lieu of granting a new trial, may vacate and set aside the findings and judgment and reopen the case for further proceedings and the introduction of additional evidence with the same effect as if the case had been reopened after the submission thereof and before findings had been filed or judgment rendered. Any judgment thereafter entered shall be subject to the provisions of sections 657 and 659 of this code."

[3] Under said section, the trial court is given broad powers "in ruling on such motion" and said section is to be liberally construed to accomplish its purposes. Shimpones v. Stickney, 219 Cal. 637, 642, 28 P.(2d) 673. As was said in Spier v. Lang, 4 Cal.(2d) 711, 53 P.(2d) 138, 140, the trial court is thereby given "the broad power to change its findings and to modify its judgment and thus avoid the necessity of a new trial. This was to subserve the ends of justice and to prevent unnecessary delays in cases where the court deemed itself mistaken as to its previous view of the evidence or in the application thereto of the law." In other words, if the trial court does not believe it necessary to have a new trial for the purpose of re-examining the issues of fact, it has the power to order its findings

and judgment changed but this power may be exercised "only in conjunction with a ruling upon the motion for a new trial." Treat v. Superior Court (Cal.Sup.) 62 P. (2d) 147, 149.

If the trial court deems it proper merely to change its findings and judgment rather than to have a new trial in a given case, it appears settled that the proper practice is to deny the motion for new trial and, in conjunction with such ruling, to grant the alternative relief provided in said section. Spier v. Lang, supra; Wyman v. Monolith Portland Cement Company, 3 Cal.App.(2d) 540, 39 P.(2d) 510; De Arman v. Connelly, 134 Cal.App. 173, 25 P.(2d) 24; Knight v. Paulton, 125 Cal.App. 688, 14 P.(2d) 94. See, also, Treat v. Superior Court, supra; R. Barcroft & Sons Co. v. Cullen, 213 Cal. 208, 2 P.(2d) 353. But this practice has led to some confusion, as it involves a denial in toto of the relief demanded in the motion for new trial and the granting of other and different relief in conjunction with the ruling on the motion. Such confusion appeared in the minds of counsel in Spier v. Lang, supra, where it was contended that such alternative relief could not be granted except upon the granting of the motion for new trial, but this contention was held to be without merit. In fact, it has been held that when a motion for new trial is granted "in general terms," the cause stands "in the exact condition in which it was before any trial thereof had been had" (Bloomquist v. Haley, 204 Cal. 258, 268 P. 364, 365), and that no *subsequent* order may be made modifying the judgment previously entered. Mitchell v. Rasey, 139 Cal.App. 350, 33 P. (2d) 1056; Sparr v. Byers, 139 Cal.App. 668, 34 P.(2d) 787.

In the light of these authorities, we may now consider the action of the trial court in the present case. In its order, the trial court stated: "Motion of defendant for new trial * * * is now granted in part and findings and judgment ordered amended (see memorandum of opinion on file)." In said memorandum, the trial court stated: "The motion for new trial is therefore granted as to that point: to-wit, as to the status of the fund, and the findings and judgment herein will be changed and amended accordingly to conform to the views herein expressed and against the trust fund theory. Upon other points and as to other findings the motion is denied and the judgment will remain."

[4] Reading the order as a whole and particularly in the light of the memorandum which was referred to therein, it is entirely apparent that the trial court did not intend thereby to grant a new trial "in general terms" or to grant a new trial as to any issue in the sense of granting a "re-examination of an issue of fact" (Code Civ.Proc. § 656), as though no trial had been previously had. While the trial court used the expression "granted in part" in the order and the expression "granted as to that point" in the memorandum, these expressions were followed immediately by the order for the change and amendment of the findings and judgment to conform to its corrected views with respect to the legal effect of the applications and agreements. It is therefore clear that the trial court merely intended to grant the alternative relief under said section 662 in ruling upon the motion for new trial. We are therefore of the opinion that regardless of the form of the trial court's order, it constituted in substance and effect an order denying the motion for new trial and granting such alternative relief. The decision in Garcia v. Bechtol, 134 Cal.App. 615, 25 P.(2d) 987, lends support to this view. If we are correct in so treating the order made by the trial court, then under the authorities cited, there is no question from a procedural standpoint regarding the propriety of that order or the propriety of the action of the trial court in subsequently signing the amended findings and the amended judgment.

[5] But even if we are in error in the views which we have expressed regarding said order, we are nevertheless of the opinion that the amended judgment should be affirmed. If said order be treated as one granting a new trial as to any or all issues of fact, we find from an examination of the transcript and the briefs in this case that there is no controversy whatever between the parties on any issue of fact. The sole issue is now of law involving the determination of the legal effect of the applications and agreements executed by the several plaintiffs. If the trial court erred in signing amended findings and entering an amended judgment without first hearing the cause on a trial de novo, then there is no showing that such error has resulted in miscarriage of justice. Const. art. 6, § 4½. In fact, it affirmatively appears from what has been said above regarding the issue of law involved, that a second trial of the cause would have necessarily resulted in a judgment similar in all respects to the one from which plaintiffs have appealed.

The appeal from the original judgment entered on September 3, 1935, is dismissed; the amended judgment entered on November 16, 1935, is affirmed; and the orders denying plaintiffs' motions to set aside said amended judgment are also affirmed.

I concur: STURTEVANT, J.



21 Cal.App.2d 323

BIXBY v. FREEMAN et al.

Civ. 11312.

District Court of Appeal, Second District, Division 1, California.

June 10, 1937.

1. Appeal and error ⇐901

An appellant must point out clearly and concisely the matter complained of as error and the reasons why error exists.

2. Appeal and error ⇐195

An order sustaining demurrer without leave to amend is not reversible error where no request has ever been made to amend.

3. Appeal and error ⇐766

An appeal from judgment after order sustaining demurrer without leave to amend would be dismissed where appellant did not indicate nature of action, relief sought, or specific error claimed to have been committed, and made no request to amend.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Elizabeth Irving Bixby against Empsie C. Freeman and another. From the judgment, the plaintiff appeals.

Appeal dismissed.

Franklin P. Bull, George D. Higgins, and W. Frank Shelley, all of Los Angeles, for appellant.

O'Melveny, Tuller & Myers and Pierce Works, all of Los Angeles, for respondents.

DORAN, Justice.

This is a motion to dismiss an appeal from a judgment after an order sustaining a demurrer without leave to amend, or to affirm said judgment. The only valid claim asserted by appellant is, in substance, to the effect that the court by such order abused its discretion. It is simply urged by appellant, as a conclusion, that the complaint stated a cause of action.

[1] Respondents moved to dismiss the appeal on various grounds, all of which appear to be well founded. As far back as Brown v. Tolles, 7 Cal. 398, 399, the court declared: "If a party complains of error, and seeks a reversal, it is due to us that he should show wherein the error consists." It was later declared in People v. California Protective Corp., 76 Cal.App. 354, 362, 244 P. 1089, 1092, "Appellant makes no attempt to point out wherein the ruling on the second demurrer is erroneous. * * * 'It is due to this court from the members of the bar to point out clearly and concisely the rulings complained of as erroneous and the reasons why they are so, with reference to authorities, if any. In case counsel will not take the trouble to do so, we shall deem the matter as of not sufficient importance to merit notice in an opinion.' People v. McLean, 135 Cal. [306] 309, 67 P. [770] 771."

[2] The record does not reveal that appellant ever asked leave to amend, and it is held in Haddad v. McDowell, 213 Cal. 690, 3 P.(2d) 550, 551, "The fact that it was sustained without leave to amend does not constitute reversible error, in the absence of a request or application by the plaintiff for such permission. No contention is made by the plaintiff that he ever asked, or made any attempt, to amend his amended complaint after the court sustained the demurrer thereto. This question has frequently been before this court, and in each and every instance the action of the trial court in sustaining a demurrer under such circumstances has been sustained."

[3] Appellant's brief wholly fails to indicate the nature of the action, the relief sought, or the specific error claimed to have been committed by the trial court, aside from the mere reiteration of the claim that it was error to sustain the demurrers without leave to amend.

Under such circumstances, the motion should be and is granted, and the appeal, therefore, is dismissed.

We concur: HOUSER, P. J.; YORK, J.

21 Cal.App.2d 299

SPIEGELMAN v. METROPOLITAN LIFE INS. CO.

Civ. 10224.

District Court of Appeal, First District, Division 1, California.

June 8, 1937.

Rehearing Denied July 8, 1937.

Hearing Denied by Supreme Court Aug. 5, 1937.

1. **Insurance** ⇐388(3)

When an insurer, after knowledge of any default for which it might terminate life policy, enters into negotiation which recognizes its continued validity, right to claim forfeiture for such default is waived.

2. **Insurance** ⇐388(3)

Waiver of default authorizing forfeiture of life policy may be implied from acts of parties.

3. **Insurance** ⇐665(8)

Where acts of insurer's agent were reasonably calculated to mislead insured, and insured's representative paid each amount as requested by insurer's agent, which were sufficient to meet premium, evidence sustained finding that insurer's acts constituted waiver of right to declare forfeiture.

4. **Insurance** ⇐603

Where insured's representative paid amount of premium which insurer's agent, after calculating loan value and dividend payable, stated was necessary and also additional sum which insurer's district manager demanded, but where insurer thereafter notified insured that reinstatement was necessary, insured signing application for reinstatement and accepting repayment of premium after insured had become ill did not abandon his rights.

5. **Appeal and error** ⇐1051(2)

Admission of evidence regarding insurer's agent's representation as to loan value of life policy over objection that agent was without authority to bind insurer, if erroneous, was not so prejudicial as to require reversal where other undisputed facts amply supported judgment for beneficiary.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Helen Spiegelman against the Metropolitan Life Insurance Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Knight, Boland & Riordan, J. W. Radil, and Richard M. Sims, Jr., all of San Francisco, for appellant.

Keyes & Erskine and J. Benton Tulley, all of San Francisco, for respondent.

PER CURIAM.

An appeal from a judgment upon a verdict in an action against the insurer brought by the beneficiary under a policy of life insurance.

The appellant, who was the insurer, contends that the policy had lapsed for failure to pay the premium, and was not reinstated; and that the admission over objection of certain statements by an agent was prejudicially erroneous.

Maurice Spiegelman was the holder of the policy, which was for $10,000, and an annual premium thereon in the sum of $376.10 became due on May 26, 1933. By indorsement on the policy the plaintiff was designated as the beneficiary. Prior to June 30, 1932, the insured had borrowed from appellant upon the policy the sum of $2,508.35, and the interest on the loan to May 26, 1932, was $137.31. There was due the insured on this date a dividend of $69.96. Notice of the due date of the premium, stating the amount of the premium, the dividend, and the interest on the loan, was given by the insurer before the due date. One Sims was an agent for the insurer, who the latter admits had authority to collect premiums, solicit insurance, deliver form applications for insurance and loans, and to transmit the same when paid or executed to the insurer. For some time before and after the due date the insured was absent from the state but was represented in San Francisco by his son who, according to the testimony, was authorized "to do whatever was necessary to take care of the premium on the policy." After the due date, but before the expiration of the grace period under the policy, Sims called on the son, and was informed that the insured wished a premium loan for as much as would be permitted under the policy. Sims thereupon calculated the loan value of the policy, the dividend payable, and the amount necessary to meet the premium. He determined the net amount required to be the sum of $57, and this was paid. On June 30, 1933, seven days later and four days after the grace period, the manager of the insur-

er's district office in San Francisco notified the insured that an error in determining the amount necessary to meet the premium had been made by Sims, and that the additional sum of $153.23 was necessary. On August 21, 1933, this amount was also paid. About October 9, 1933, the insured was notified that the policy had lapsed and that it would be necessary for him to apply for reinstatement. It was testified that the latter, believing this to be true, signed an application for reinstatement, thereupon the insurer demanded as a condition that he be examined by its physician. It appears that while these negotiations were pending the insured was suffering from the disease which caused his death on March 19, 1934, and no examination by the insurer's physician was made. On December 27, the insurer sent the insured its check for $213.33 covering the two payments he had made. It was also testified that the insured, still believing the policy to have lapsed, cashed the check.

The insurer claims that the payments were accepted conditionally, and that its agents were not authorized to accept or receipt for premiums paid after the grace period provided by the policy.

[1-3] The policy provided that no agent, except those at its head office in New York, should have authority to modify the terms of its policies, and that no payments except those made in exchange for an official receipt issued by its head office should be valid. Nevertheless, it is well settled that, when an insurance company, after knowledge of any default for which it might terminate a policy, enters into negotiations which recognize its continued validity, the right to claim a forfeiture for such default is waived; and a waiver may be implied from the acts of the parties. Murray v. Home, etc. Association, 90 Cal. 402, 27 P. 309, 25 Am.St.Rep. 133; Knarston v. Manhattan Life Ins. Co., 124 Cal. 74, 56 P. 773; Faris v. American, etc., Co., 44 Cal.App. 48, 185 P. 1035. Here the acts of the insurer's agent, due to errors in arriving at amounts owing, were reasonably calculated to mislead the insured. The latter's representative paid each amount as requested by the insurer's agent, which were sufficient to meet the premium; and the evidence supports the conclusion that these payments were not received conditionally. In view of testimony which the jury believed, the conduct of the insurer in the circumstances was inequitable; and sufficient appears to sustain a finding that its acts constitute a waiver of the right to declare a forfeiture.

[4] Nor was the application for reinstatement of the policy, or the acceptance of a repayment made by the insurer after the insured became ill, necessarily an abandonment of his rights. He appears to have accepted as true the insurer's representations, and it is evident that he misapprehended both the facts and the law. Under such circumstances the law gives relief (Rued v. Cooper, 119 Cal. 463, 51 P. 704; Hannah v. Steinman, 159 Cal. 142, 112 P. 1094; Civ.Code, §§ 1577, 1578), and this is a case where it should be afforded.

[5] Some evidence of representations by Sims as to the loan value of the policy was introduced over objection that he was without authority to bind the insurer. This, if erroneous, was not prejudicial to a degree which would justify a reversal of the judgment, as other undisputed facts amply support it.

The judgment is affirmed.



21 Cal.App.2d 233

BRITE v. BOARD OF SUP'RS OF SISKIYOU COUNTY et al.

Civ. 5886.

District Court of Appeal, Third District, California.

June 1, 1937.

1. Mandamus ⇐143(1)

In mandamus proceeding to compel board of supervisors to consider claim for reward, where claim had been submitted in three forms, defense that mandamus had been prematurely sought before expiration of 90 days from filing last claim would not be considered, under statute construed as giving board of supervisors 90 days within which to investigate claim, since it was uncertain to which claim statutory period would apply (Pol.Code, § 4078).

2. Mandamus ⇐101

The Court of Appeal cannot issue mandate compelling county board of supervisors to allow claim for reward, but can only compel board to pass on claim within certain length of time (Pol.Code, § 4041).

3. District and prosecuting attorneys ⇐8
Sheriffs and constables ⇐86

The duty of arresting and apprehending criminals charged with murder rests on sheriff, not on district attorney (Pol.Code, § 4157; § 4307, subd. 2, as amended by St.1935, p. 1461).

4. Rewards ⇐4

An offer of reward for apprehension of murderer, by district attorney pursuant to resolution of county board of supervisors, was void and unenforceable in view of statute construed as vesting power to offer rewards exclusively in Governor (Pol.Code, § 380, subd. 8; § 4307, subd. 2, as amended by St.1935, p. 1461; Pen.Code, § 1547).

5. Rewards ⇐4

A county and officers thereof have no power to offer rewards for apprehension of criminals in absence of specific statutory authority, since offer of rewards is primarily state function (Pol.Code, § 4307, subd. 2, as amended by St.1935, p. 1461).

Petition for writ of mandate by Margaret Brite against the Board of Supervisors of Siskiyou County, State of California, and others. On demurrer to the petition.

Demurrer sustained, writ denied, and petition dismissed.

Horace F. Frye and Huston, Huston & Huston, all of Sacramento, and J. Everett Barr, of Yreka, for petitioner.

James M. Allen, of Yreka, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

This cause is before us upon the petition of the above-named Margaret Brite praying that a writ of mandate be issued requiring the respondents to show cause why they should not be required to allow and pass upon a certain claim filed by the petitioner praying for the sum of $1,000 as a reward for the apprehension and arrest of John Brite and Coke Brite, charged with the crime of murder, the petition being based upon an alleged resolution of the Board of Supervisors of Siskiyou County authorizing the district attorney thereof to offer a reward of $500 for the arrest of each of the persons just named, and the posting of such a reward by the district attorney of said county.

The petition sets forth the filing of a claim for said reward, on or about the 17th day of December, 1936, and on or about the 27th day of March, 1937, petitioner filed an amended claim in said matter, asking for the payment of said reward; that on or about the 1st day of April, 1937, a further amended claim relating to said reward was filed by said petitioner. The petition further alleges that said Board of Supervisors has failed and neglected to act upon said claim, to wit: That said board has neither allowed nor rejected the same.

To this petition the respondents have filed their demurrer, setting forth several grounds, three of which we will mention and consider, herein, to wit:

First. That said petition shows on its face that it was filed prematurely, and that the claim in its final form was not submitted to the board for action or filed with the clerk of said board until the 5th day of April 1937;

Second. That this court has no jurisdiction to compel the Board of Supervisors to allow said claim, or to make any order further than that said board act upon the same;

Third. That the Board of Supervisors had no authority to authorize the offering of a reward for the arrest and apprehension of said John Brite and Coke Brite, or either of them, said persons being charged with the crime of murder, and that the offer, and posting of notice of reward by the district attorney of the county of Siskiyou pursuant to said resolution was illegal and void.

[1] Section 4078 of the Political Code is to the effect that if the Board of Supervisors neglect to allow or reject a claim or demand for ninety days after the same has been filed with the clerk of the board, such refusal or neglect may, at the option of the claimant, be deemed equivalent to a final action and rejection on the ninetieth day after the filing of the claim. It would seem that the purpose of this section was and is to give a board of supervisors that

length of time within which to investigate and inform themselves of the merits or demerits of any claim filed against the county. Due to the fact that the claim involved herein has been filed in three different forms, it becomes uncertain as to whether the ninety-day period should be held to apply to the claim filed by the petitioner in this cause.

[2] By reason of what is hereinafter said, we will not further consider the contention of the respondents that this proceeding has been instituted by the petitioner prematurely. That this court cannot order the respondents, as the Board of Supervisors of Siskiyou County, to allow the claim presented by the petitioner, seems to be well settled. The extent of the order, were it to be conceded that the petitioner was entitled thereto, would only be to the extent of requiring the Board of Supervisors, within a certain length of time, to pass upon the claim presented by the petitioner. Section 4041, Pol.Code; 7 Cal.Jur. p. 541; County of Yolo v. Joyce, 156 Cal. 429, 105 P. 125; County of Tehama v. Sisson, 152 Cal. 167, 92 P. 64; Thiel, etc., Co. v. Tuolumne County, 37 Cal.App. 423, 173 P. 1120; Tilden v. Sacramento County Board of Supervisors, 41 Cal. 68.

The limit of the authority of the court in this cause being to direct action upon the claim filed by the petitioner, the question arises, has any legal claim been filed against the county of Siskiyou justifying even an order directing the Board of Supervisors of said county to act thereon.

[3] The claim filed by the petitioner is based upon the provisions of subdivision 2 of section 4307 of the Political Code (as amended by St.1935, p. 1461). That subdivision reads: "The traveling and other personal expenses of the district attorney and the sheriff incurred in criminal cases arising in the county, and in civil actions and proceedings in which the county is interested, and all other expenses necessarily incurred by either of them in the detection of crime, and in the prosecution of criminal cases, and in civil actions and proceedings and all other matters in which the county is interested," etc., constitute valid charges. This language does not purport to authorize either of said officers to offer or post a reward for the apprehension of persons charged with murder, nor is there anywhere in the Political Code a provision authorizing the board of supervisors of any county to offer a reward for the arrest and apprehension of persons charged with murder.

The duty of the district attorney does not extend to the arrest and apprehension of persons charged with murder. That duty, by section 4157 of the Political Code, devolves upon the sheriff. Subdivision 2 of section 4307, supra, has received consideration by this court, and also by the Supreme Court.

In Cunning v. Carr, 69 Cal.App. 230, 230 P. 987, this section was held to authorize the district attorney to employ or engage the services of detectives or persons in the collection of testimony to be used in the prosecution of persons arrested and charged with crime.

Section 4153 of the Political Code in general terms defines the duty of the district attorney or public prosecutor, setting forth that it is his duty to institute proceedings before magistrates, draw indictments, give opinions, prosecute actions, for and in the name of the county, and defend the county in actions instituted against it. Nowhere does this section authorize the district attorney to assume any of the duties imposed upon the sheriff of a county by section 4157, supra. Nor does the section, in prescribing the duties of the district attorney, authorize such officer to offer a reward for the arrest and apprehension of anyone charged with a public offense.

The questions considered in the case to which we have referred were presented to the Supreme Court in the case of Cunning v. County of Humboldt, 204 Cal. 31, 266 P. 522. The same line of reasoning was followed and the same conclusion was reached as was arrived at in the case of Cunning v. Carr, supra.

Section 1547 of the Penal Code is in the following words:

"The governor may offer a reward not exceeding one thousand dollars ($1000) payable out of the general fund, for the apprehension—

"1. Of any convict who has escaped from the state's prison;

"2. Of any person who has committed, or is charged with the commission of an offense punishable with death;

"3. For the arrest of each person engaged in the robbery of, or any attempt to rob any person or persons upon or having in charge in whole or in part any stagecoach, wagon, railroad train or other con-

veyance engaged at the time in carrying passengers or any private conveyance within this state.

"The reward to be paid to the person or persons making the arrest, immediately upon the conviction of the person or persons so arrested."

[4] It seems to us clear from the language used in this section that the intent of the Legislature, in authorizing the Governor to offer a reward for a certain sum, necessarily excludes the authority of any county officer to offer a reward for an offense against the people of the state. The same limitation would apply to subdivision 8 of section 380 of the Political Code, which authorizes the Governor to issue a reward for the apprehension of any one charged with the commission of an offense punishable with death. No other provision is made in either the Penal or Political Code relative to rewards, and no other authorization having been expressed, it necessarily follows that the legislature intended to confine the offering of rewards for the apprehension of persons charged with offenses against the people of the state, exclusively in the Governor, and vested the same exclusively in him. The authorities in support of this position are practically unanimous and have been approved by the courts of this state.

In Griffin v. City of Los Angeles, 134 Cal.App. 763, 26 P.(2d) 655, 657, where the plaintiff in that case sought to obtain a judgment against the city of Los Angeles in the sum of $2,500 for the arrest and conviction of a person charged with murder, the trial court in its conclusions of law used the following language: "That 'the defendant City of Los Angeles was not authorized or empowered by the Constitution or general laws of the state of California or by the charter of said City of Los Angeles to offer a reward for the apprehension and conviction of a murderer.'" A hearing in that case by the Supreme Court was denied.

While the opinion in the Griffin Case takes up and decides many technical questions, the final conclusion is to the effect that the law stated by the judge of the trial court is applicable to persons charged with murder. The opinion goes on to show that the crime of murder is an offense against the people of the state, and is in no sense a municipal affair, and municipal authorities, unless expressly so empowered by statute, possess no authority to offer rewards. The court in the case which we have cited quotes from the opinion in the case of City of Winchester v. Redmond, 93 Va. 711, 25 S.E. 1001, 57 Am.St.Rep. 822, as follows: "Municipal corporations are chartered, as we have seen, to regulate and administer the local and internal concerns of the people of the particular locality which is incorporated. They are not created to execute the criminal laws of the state. That is a matter for which the state has made ample provision by general statutes, and with which the corporation, as such, has nothing to do, unless expressly authorized by its charter or by statute. Hence the offer of a reward for the apprehension and conviction of an offender against the criminal law of the state is the exercise of a state power, and is foreign to the objects and purposes of a municipal corporation. Other authorities to the same effect are cited in vol. 19, at page 974, Ruling Case Law; Murphy v. City of Jacksonville, 18 Fla. 318, 43 Am. Rep. 323; Hanger v. Des Moines, 52 Iowa, 193, 2 N.W. 1105, 35 Am.Rep. 266."

[5] To the same effect is the rule set forth in 22 California Jurisprudence, p. 428, where it is stated a public officer cannot bind the state or any of its subdivisions by such an offer, unless authority is conferred by legislation (referring to rewards). The authorization as to the governor offering rewards is there also considered and set forth.

In 19 Ruling Case Law, 794, sec. 101, it is said: "The prevention of crime and the enforcement of the criminal law is a function of the State rather than of any subdivision thereof. * * * It is for this reason that it is held by the weight of authority that a municipal corporation has no implied power to offer a reward for the apprehension or conviction of persons guilty of crime, and that an action cannot be maintained against it upon such an offer." It appears that some of the authorities make an exception as to the offense of arson, which is held to be a local affair.

In the case of City of Los Angeles v. Gurdane, 59 F.(2d) 161, the Circuit Court of Appeals, having before it a like question involving an attempt to obtain a judgment against the city of Los Angeles for and on account of the reward offered for the arrest and apprehension of the murderer of Marion Parker (Hickman case), held that the offer of a reward for the ap-

prehension of a felon was not within the broad powers possessed by a municipality. The court further held that the city charter of the city of Los Angeles did not authorize the city to offer a reward for the arrest and apprehension of felons.

In Felker v. Board of Commissioners of Elk County, 70 Kan. 96, 78 P. 167, 3 Ann. Cas. 156, the Supreme Court of Kansas held that a board of county commissioners possessed no authority to offer a reward for the arrest and conviction of persons charged with the commission of offenses against the laws of the state. It was there held that the arrest and conviction of criminals concerns the state, and not simply a county. The board of supervisors was there charged with looking after the civil affairs of the county, just as is the case here. It was also held that the state might empower or make it the duty of county boards of supervisors to offer rewards, but there must be express authority to that effect. It is further held that the law in that state, just as in this state, had empowered the Governor to offer a reward, and the sole authority so to do was vested in the Governor. The language of the opinion is so applicable to the case at bar that we quote therefrom as follows: "The state, of course, might empower or make it the duty of the county board to offer rewards; but as it is a state function, and one outside of the scope of the ordinary duties of a county board, there must be express authority before the board can create a liability against the county by such an offer. No such power has been conferred, and when the Legislature had under consideration the matter of rewards for the apprehension and conviction of criminals, the authority to offer and pay rewards was specifically given to the Governor, and it was therefore impliedly withheld from every other officer or tribunal. Gen.St.1901, §§ 5760, 7332. In the absence of an express provision giving a county or other municipality of the state express authority to offer rewards for the apprehension and conviction of offenders against the criminal laws of the state, the authorities generally hold that no such power exists. Hanger v. City of Des Moines, 52 Iowa, 193, 2 N.W. 1105, 35 Am.Rep. 266; Gale v. Inhabitants of South Berwick, 51 Me. 174; Board of Commissioners v. Bradford, 72 Ind. 455, 37 Am.Rep. 174; Mountain v. Multnomah County, 16 Or. 279, 18 P. 464; Abel v. Pembroke, 61 N.H. [357] 359; Crofut v. Danbury, 65 Conn. 294, 32 A. 365; Patton v. Stephens, 77 Ky. [14 Bush] 324; Murphy v. Jacksonville, 18 Fla. 318, 43 Am.Rep. 323; Baker v. Washington, 7 D.C. 134; 24 A. & E. Ency. of Law (2d ed.) 944."

In view of what we have stated, and the authorities cited, it must be held that no legal claim has been filed by the petitioner with the clerk of the Board of Supervisors of the County of Siskiyou, and that the action of the Board of Supervisors, and also of the district attorney, in relation to offering a reward for the arrest and apprehension of John and Coke Brite were in excess of any authority possessed by the Board of Supervisors or by the district attorney of Siskiyou county.

The demurrer is sustained.

The writ is denied, and the petition dismissed.

We concur: PULLEN, P. J.; THOMPSON, J.



21 Cal.App.2d 240

GRAY v. SOUTHERN PAC. CO. et al.

Civ. 10236.

District Court of Appeal, First District, Division 1, California.

June 2, 1937.

Hearing Denied by Supreme Court July 29, 1937.

1. Coroners ⇐18

Under statutes providing that where cause of death is unknown the coroner must file certificate stating cause of death, the coroner to determine cause of death must make a proper examination to show the cause of death and exclude all other supposable causes (St.1919, p. 447, § 5; St.1933, pp. 1260, 1265, §§ 7, 8).

2. Negligence ⇐6

There can be no liability for an act required by law.

3. Officers ⇐119

In suits brought against officers, where it is sought to make them personally liable, the complaint should set forth the special circumstances which are relied on to establish the liability.

4. Coroners ⇐23

In an action for alleged wrongful performance of an autopsy on a dead body, complaint, which failed to show on its face that cause of death was known or that no accident was involved or other circumstance which would have made act illegal, did not state cause of action by alleging the act to have been unlawful, malicious, and oppressive, since under statutes coroner must in certain circumstances make an autopsy and hence it was necessary to allege that the autopsy complained of was not one required or authorized by law (St.1919, p. 447, § 5; St.1933, pp. 1260, 1265, §§ 7, 8).

5. Coroners ⇐23

Where complaint did not show that autopsy on dead body was performed unlawfully, allegations of mental and physical shock to wife of deceased were not actionable.

6. Appeal and error ⇐172(1)

Where complaint did not show an autopsy on a dead body to have been unlawful and on that ground trial court granted defendant's motion for judgment on the pleadings, plaintiff's contention that certain allegations to the effect that certain organs had been removed and retained constituted a cause of action was available on appeal though not suggested to trial court.

7. Dead bodies ⇐9

In an action for wrongful performance of autopsy on a dead body of plaintiff's husband, allegations to effect that mutilation of husband's body by coroner caused complainant mental pain and suffering did not state a cause of action for retention of parts of body by coroner, since the distress alleged was not attributed to the retention but to the mutilation.

8. Dead bodies ⇐1

There is no right of property as such in the dead body of a human being.

9. Dead bodies ⇐1

The right to possession of the dead body of a human being is one recognized for the purpose of determining who shall have its custody for the purpose of burial.

10. Coroners ⇐23

Where a coroner retains parts of a human body after autopsy violating right of possession for decent burial, such violation could give rise to more than a cause of action for nominal damages.

11. Appeal and error ⇐1171(6)

In an action for wrongful performance of an autopsy on a dead body, allegations of complaint charging defendant with having removed and retained parts of the dead body though not considered by trial court did not justify reversal of order of trial court rendering judgment on pleadings for defendant, since allegations could give rise to more than nominal damages which would not justify reversal of judgment to procure such an award.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Julian Ann Gray against the Southern Pacific Company, a corporation, and others. Judgment for the defendants, and plaintiff appeals.

Affirmed.

Raymond Perry and Abraham Setzer, both of San Francisco, for appellant.

A. B. Dunne, L. G. Dorety, and Dunne & Dunne, all of San Francisco, for respondents Southern Pac. Co. and Bessie E. Scharpff.

Henry Heidelberg, Deputy City Atty., of San Francisco, for respondents Thomas B. W. Leland and Jesse E. Carr.

Hadsell, Sweet, Ingalls & Lamb, of San Francisco, for respondents Sherman Leland, A. M. Moody and Earl N. Greenwood.

Horace W. B. Smith, of San Francisco, for respondent Earl N. Greenwood.

PER CURIAM.

This is an appeal from a judgment in favor of the defendants in an action brought to recover damages for the alleged wrongful performance of an autopsy upon the body of one Wallace Lester Gray and is brought by his widow. The defendants are the coroner of the City and County of San Francisco, the autopsy surgeon of the coroner, the coroner's assistant autopsy surgeon and pathologist, two physicians and surgeons employed by defendant Southern Pacific Company in the general hospital of that corporation, and one Bessie E. Scharpff, a nurse.

Gray, an employee of the Southern Pacific Company, died in said hospital on August 16, 1934, which he had entered as a patient on May 2 of that year, his death resulting from natural causes. The plaintiff on the day of her husband's death demanded

of said Bessie E. Scharpff the body of the deceased. This demand was refused and the body was immediately given into the custody of the coroner and his assistants, who on the same day, in conjunction with the other doctors named, performed an autopsy thereon.

The defendants having answered to the complaint, and the cause coming on for trial, they moved for a judgment on the pleadings—the Southern Pacific Company on the ground that the complaint stated no cause of action in that it showed no facts which would exclude it from the effect of the provisions of section 8 of the Vital Statistics Act (St.1915, p. 579, Deering's General Laws 1931, Act 9008, as amended by St.1933, p. 1265), and particularly that there was no showing on the face of the complaint that the cause of death was known, or that no accident was involved; Bessie E. Scharpff on the same grounds and, in addition, that the action as to her was barred by the statute of limitations; Sherman Leland, A. M. Moody, and Earl N. Greenwood upon the same grounds with the exception of the statute of limitations; and Thomas B. W. Leland and Jesse L. Carr upon the ground that no showing was made in the complaint except by way of conclusions of law and conclusions of the pleader that it was not the duty of the coroner to perform the autopsy, and, in addition as to the defendant Carr, that he was merely an employee of the coroner carrying out orders of his superior.

The motion of the respective defendants was granted by the court upon the ground that the complaint states no cause of action and, the plaintiff declining to amend, judgment was entered for the defendants.

The allegations of the complaint touching the autopsy are as follows: "That on the said 16th day of August, 1934 and after the death of said Wallace Lester Gray plaintiff did demand the custody and possession of the body of the late Wallace Lester Gray from the defendants Southern Pacific Company, a corporation, and Bessie E. Scharpff, and their employees, servants and agents, and said defendants did unlawfully, willfully, maliciously and oppressively remove, conceal and retain the body * * * without any right or authority. That on said 16th day of August * * * the defendants unlawfully, willfully, maliciously and oppressively and without the consent, knowledge or authority of plaintiff, did mutilate, desecrate, violate and outrage and did commit an act of irreverence and profanation upon the body of (deceased) in that, without the permission of the plaintiff, the widow * * * who was then and there entitled to the custody of the body * * * for the purpose of burial, and without authority of law, did perform * * * a mutilation, desecration and violation upon said body * * * and did cut into and remove portions of the bony structure of said body, including the skull spinal column" (here follows an enumeration of various bodily organs) "and did and have retained in their possession all of such portions of the internal organs and bony structure of the body * * * so removed, and did render impossible the embalming of said body and its view to relatives and to those to whom said deceased was endeared. That said mutilation, desecration, violation and outraging of the head and body of her deceased husband * * * was repugnant to the plaintiff, was offensive to and indecently insulted the said plaintiff, and by reason of said acts and each of them did cause the plaintiff a shock to her mental and physical equipoise, causing violent agitation of her feelings and disturbance of her mind, and wrecking her mental and physical equipoise, to her horror, mental anguish and extreme disgust, and disturbing permanently her peace of mind and causing her to be and become permanently sick in mind and body."

In support of the judgment, the respondents contend that under the law of this state it is the duty of the coroner under certain circumstances to perform an autopsy upon the body of a deceased person; and that, in order to state a cause of action against him and those co-operating with him under his direction, the complaint must, in the absence of allegations of negligence or other wrong in the performance of the details of the task, set out facts and circumstances showing that the autopsy was not one which the law required or authorized him to perform. It is pointed out by them that the coroner is required to act where the cause of death is not known, or where an accident or injury is a contributing cause; and while the complaint, in attempting to negative the fact that an autopsy was proper in this case, sets forth that the deceased was not killed, that he did not commit suicide, and did not die suddenly under such circumstances as to afford a reasonable ground to suspect that his death was occasioned by criminal means, these all being situations in which the coroner is required to act, it fails to negative the existence of

other circumstances which equally make it his duty to intervene, such as, that the cause of death was known, or that the attending physician knew or was able to state the cause of death, or that no accident or injury was involved therein.

[1] The policy of the laws of this state and their specific provisions require that the cause of every death shall be known. If it is not known at the time of its occurrence, it must be determined thereafter. The Vital Statistics Act (Stats.1915, p. 575, as amended, Deering's Gen.Laws, 1931 ed., Act 9008, as amended) makes it a criminal offense for any person to inter, cremate, or otherwise finally dispose of the dead body of a human being without the authority of a burial or removal permit; and section 5, as amended by St.1919, p. 447, thereof prohibits the issuance of such permit unless, wherever practicable, a complete and satisfactory certificate of death has been filed, stating the cause of death. Section 7 of the act as amended by St.1933, p. 1260, provides that the medical certificate must be made and signed by the physician, if any, in last attendance on the deceased except in those cases in which he is unable to state the cause of death, or where a person has been killed, or has committed suicide, or his death is the result of an accident, and other enumerated cases. In section 8, as amended, it is made the duty of the coroner to furnish the certificate in certain cases, including that in which the attending physician is unable to state the cause of death. In this certificate the coroner must state the name of the disease causing death, or, if from external causes, the means of death, and whether (probably) accidental, suicidal, or homicidal. The question immediately arises, If the attending physician is unable to state the cause of death, how is the coroner, whose connection with the case commences after death has ensued, to be placed in a position to do so? Obviously, it must be by an examination of the body. It is equally obvious that such an examination, in order to comply with the requirements of the last-mentioned section of the act, must be thorough, and may in many cases entail the opening of the body and an examination of its organs or such of them as result in furnishing the desired information. A proper examination "to establish the cause of death should show not only a cause, but should exclude all other supposable or possible causes." Kingsley v. Forsyth, 192 Minn. 468, 257 N.W. 95, 98.

[2-4] There can be no liability for an act required by law (Huntly v. Zurich General Accident & Liability Ins. Co., 100 Cal. App. 201, 280 P. 163); and in suits brought against officers, where it is sought to make them personally liable, the declaration or complaint should set forth the special circumstances which are relied on to establish the liability (46 Cor.Jur., Officers, § 340, p. 1048). So, in charging a coroner and his lawful assistants with illegality in performing an autopsy, the complaint should set forth the circumstances which make it illegal; and this we think can only be done by showing through proper allegations that it was not one of those that the coroner was authorized to perform. This to some extent the complaint undertook to do but fell short in its enumeration of them. Shorn of its adjectives "unlawfully," "maliciously," and "oppressively," and having in mind that the most proper and necessary cutting into a corpse may be described as a mutilation of it, the acts charged against the coroner and his assistants are not shown to have been illegal or wrong. It is not enough to charge that the act complained of was unlawful or was maliciously or oppressively done. As was said in the case of Wilson v. Spencer, 91 Neb. 169, 135 N.W. 546, 547, citing Cooley, Torts (3d Ed.) 832: "The mere allegation in the petition that in performing work which was clearly within the scope of his duties the officer acted maliciously, wantonly, and unlawfully does not state an actionable wrong. 'Bad motive, by itself, then, is no tort. Malicious motives make a bad act worse, but they cannot make that a wrong which in its own essence is lawful. * * * When in legal pleadings the defendant is charged with having wrongfully and unlawfully done the act complained of, the words are only words of vituperation, and amount to nothing unless a cause of action is otherwise alleged.'"

[5] If, as we think we have shown, the complaint does not show the autopsy to have been unlawful, the mental and physical shock and distress caused thereby to the plaintiff—which is the gravamen of the action (Huntly v. Zurich General Accident & Liability Ins. Co. supra)—gave rise to no cause of action.

[6-11] In support of the appeal, it is further urged that, assuming that the complaint does not show the autopsy to have been unlawful, certain allegations contained therein to the effect that various organs of the body were removed during the autopsy

and have been retained by the defendants are sufficient to state a cause of action, and that on this ground the motions for judgment on the pleadings were improperly granted.

This point was not suggested on the hearing in the trial court, the plaintiff's effort to sustain the complaint being there based upon the alleged unlawfulness of the autopsy. The point, however, is nevertheless available here, but we think it without merit.

It is not claimed that the plaintiff has any property right in the body or any of its parts; the right claimed to have been violated is the right to possession by the wife of her deceased husband's body for the purpose of decent burial free of mutilation by an autopsy thereon. The allegation of the complaint in this regard is to the effect that the mutilation of her husband's body produced on the plaintiff a mental and physical shock, disturbed permanently her peace of mind and caused her to become sick in mind and body. The distress suffered by the plaintiff is in no way attributed to the retention of the removed organs, nor does it appear that at the time of the occurrence of the shock and distress described she was aware of such retention. The action is not one for conversion, nor could it be, as the law recognizes no right of property as such in the dead body of a human being. The right is to the possession of the body, and is one recognized for the purpose of determining who shall have its custody for the purpose of burial. Huntly v. Zurich General Accident & Liability Ins. Co., supra; Painter v. U. S. F. & G. Co., 123 Md. 301, 91 A. 158; Foley v. Phelps, 1 App.Div. 551, 37 N.Y.S. 471. Aside from the question of pleading and assuming a violation of plaintiff's right to the return of the removed organs, such violation could give rise to no more than nominal damages. Their return to the plaintiff (if such were possible) after having served their purpose in aiding in the determination of the cause of death, could have caused her only embarrassment, and, perhaps, horror; and this court would not be justified in reversing the judgment for the purpose of procuring such an award. Failure to return a verdict for nominal damages is not in general ground for reversing a judgment or granting a new trial. 5 Cor.Jur.Sec., Appeal and Error, § 1914, p. 1415; Walker v. Southern Pacific Co., 162 Cal. 121, 121 P. 369; Martin v. Pritchard, 52 Cal.App. 720, 199 P. 846; Holmes v. Snow Mountain, etc., Co., 36 Cal.App. 394, 172 P. 178; Liljefelt v. Blum, 33 Cal.App. 721, 166 P. 384.

For the foregoing reasons, the judgment is affirmed.



21 Cal.App.2d 181

REILY v. YOUNG et al.

Civ. 11165.

District Court of Appeal, Second District, Division 1, California.

May 27, 1937.

Execution ⇐161

Where judgment was settled through negotiations of attorney representing codefendant and president of corporation defendant acting under power of attorney from codefendant, corporation to which judgment was assigned with understanding that judgment was settled as to codefendant, although permitted to remain of record for ulterior purpose, was not entitled to execution on the judgment against codefendant as against motion to quash entered upon hearing to determine not the merits of the judgment but to determine whether judgment had been paid.

Appeal from Superior Court, Los Angeles County; Minor Moore, Judge.

Proceeding in the matter of a default judgment in favor of C. B. Land, assignee of A. G. Reily, against Cora B. Young and the Young Holdings Corporation, Limited, wherein two writs of execution were issued at the request of the Young Holdings Corporation as assignee of A. G. Reily's interest in the judgment. From an order recalling and quashing the writ, releasing the property attached, and directing the clerk of the Superior Court of Los Angeles County to record a satisfaction in full of the judgment, the Young Holdings Corporation appeals.

Affirmed.

W. I. Gilbert, of Los Angeles, for appellant.

James W. Bell and P. E. Keeler, both of Los Angeles, for respondent.

DESMOND, Justice pro tem.

This is an appeal from an order by which the trial court, upon the application of respondent, Cora B. Young, recalled and quashed writs of execution in the hands of the sheriffs of Kern and Los Angeles counties, at the same time ordering released all property attached; also ordering the clerk of the superior court of Los Angeles county to record satisfaction in full of the judgment upon which the executions had issued. This judgment had been entered, under a default, in favor of C. B. Land, assignee of A. G. Reily, and against respondent, on November 28, 1933. No attempt to execute upon it was made until March of 1936, when the two writs above mentioned were issued, not at the request of the original plaintiff or his assignee, but at the request of Cora B. Young's codefendant, the Young Holdings Corporation, Limited. This company, on December 8, 1933, had received a written assignment of the entire interest of Reily's assignee in the default judgment which had been taken, in the amount of $10,000, against respondent. Appellant contends that the order of the trial court should be reversed, claiming that the court erred in taking testimony of facts and occurrences antedating entry of the judgment; also that the decision of the court was contrary to the evidence adduced. It is also claimed that the parties litigant are entitled to findings, though the trial court determined that they were not necessary.

In arguing that it was improper for the court to go into circumstances leading up to the procurement of the judgment, appellant cites Weldon v. Rogers, 159 Cal. 700, 115 P. 464; but that case does not seem in point, for it relates not to a motion to quash an execution improvidently issued, but to the exercise of discretion by the court under section 685 of the Code of Civil Procedure, as amended by St. 1933, p. 2499 by which execution of a judgment may be ordered or refused after the lapse of five years from the date of its entry. The other California cases cited by appellant on this point, Town of Hayward v. Pimental, 107 Cal. 386, 40 P. 545, and Associated Oil Co. v. Mullin, 110 Cal.App. 385, 294 P. 421, as well as cases in other jurisdictions to which we are referred, have no application to this case, for they merely hold that the validity of a judgment may not be attacked by a motion to quash. As we understand it, the respondent here did not question the validity of the default judgment, but contended that it had been paid by delivery to Reily's assignee, C. B. Land, of deeds to two lots and allowing Reily to retain approximately $500 in cash which he had secured by attaching respondent's bank account. They further contended and satisfied the trial court that this arrangement for settlement of the judgment was made by a stipulation entered into with Reily's assignee by an attorney named Routhe, who at that time represented both the Young Holdings Corporation, Limited, and this respondent, Cora B. Young. This stipulation, dated November 27, 1933, was introduced at the hearing on the motion, and provided that upon the conveyance of the two lots the assignee of Reily "will immediately assign said judgment to The Young Holdings Corporation, Ltd., a corporation, owners of the said lots aforesaid. That no further levy or sale under execution incident to said judgment will be made after the aforesaid acts have been accomplished."

On December 27, 1933, Mr. Routhe wrote the respondent:

"In Re Reily case.

"It is a great relief to us all, to report that a settlement has finally been made with Reily. I do not recall having had just such a case within my 35 years experience in the law business. We did not desire to stand the expense and time for trial and the result of appeal should we be successful, and further we were confident that Klein was looking in on the situation to increase our troubles. We were desirous to release the safey Deposit Box and knew that if a trial was had and a Judgment entered in his favor, we would be unable to effect any settlement with him. Therefore, under authority of your letter on the subject of settlement and release of box, a Judgment for $10,000 was entered in his favor. (Yes I hear you utter your protest and surprise) but just wait.

"We effected such a settlement whereby, the box was released without delay and immediately shipped to you. By a conveyance of two lots, we acquired an assignment to the Young Holdings Co. of the entire judgment, which we allow to remain of record to discourage Klein and any others who are interested in your financial condition."

A cousin of respondent, acting under a power of attorney granted by her, was

president of the Young Holdings Corporation, Limited, and co-operated with Mr. Routhe in obtaining the settlement mentioned. Notwithstanding the assurances given respondent that so far as she was concerned the Reily case was closed and that the judgment was to remain of record for an ulterior purpose, appellant, after the lapse of two and a half years, and on the same day a judgment in favor of respondent and against appellant was rendered in another case, decided to execute the judgment of November 28, 1933 (unsatisfied upon the record), contrary to the purpose declared and for its own benefit. Then followed the motion in behalf of respondent. While a protracted hearing was held upon this motion, made after judgment, it was not held, as we have stated, upon the merits of the case. It is apparent that the trial judge went to great pains to determine whether in fact the judgment had been paid, or whether an unpaid balance was available for execution in behalf of appellant. Upon a review of the evidence, including correspondence passing between the parties and their duly authorized agents, as well as other written instruments introduced as exhibits, we find no error in the decision of the court. Accordingly, the order appealed from is affirmed.

We concur: HOUSER, P. J., YORK, J.

KEY NUMBER SYSTEM

CHARLES F. HARPER CO. v. DE WITT MORTGAGE & REALTY CO. et al. *

Civ. 11213.

District Court of Appeal, Second District, Division 1, California.

May 28, 1937.

Hearing Granted by Supreme Court July 26, 1937.

Limitation of actions ⇐24(1), 34(1)

A successful appellee, who did not move for judgment against sureties on appeal bond until more than four years after affirmance of judgment appealed from and remittitur, could not recover such judgment against sureties, in view of statute of limitations relating to obligation of surety, even though five-year period of limitation relating to liability of principal on judgment had not run (Code Civ.Proc. §§ 335, 343, 363, 942; § 337, as amended by St.1933, p. 2116; § 338, as amended by St.1933, p. 878; § 581a, as amended by St.1933, p. 1869).

HOUSER, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by the Charles F. Harper Company against the De Witt Mortgage & Realty Company and others. From an order denying plaintiff's motion to enter judgment against defendant John H. Blair and another as sureties, plaintiff appeals.

Affirmed.

Henry O. Wackerbarth, of Los Angeles, for appellant.

Porter & Sutton, of Los Angeles, for respondents.

BISHOP, Justice pro tem.

The plaintiff recovered a money judgment in March, 1928. To secure a stay of execution during their appeal, the defendants furnished an undertaking providing, in effect, as required by section 942 of the Code of Civil Procedure, that if the judgment was affirmed and the defendants did not pay the judgment within thirty days after the filing of the remittitur, then judgment could be entered against them. The judgment was affirmed and the remittitur was thereafter filed August 17, 1931. The judgment was not paid, except in part, and on the 9th day of July, 1936, the plaintiff moved that judgment be entered against those who had signed the undertaking as sureties. From the lower court's order denying its motion, the plaintiff has appealed. We have reached the conclusion that this order should be affirmed.

The plaintiff had its choice of two remedies against the sureties, when thirty days had passed after the filing of the remittitur and the judgment had not been paid. It could have moved without notice for a judgment against the sureties. Duerr v. Sloan (1920) 50 Cal.App. 512, 195 P. 475; Roberts v. Fitzgerald (1928) 94 Cal.App. 747, 271 P. 1110. By its terms, section 942, supra, seems more concerned with providing this summary remedy than it does in creating a liability. The remedy is provided because of the liability on the part of the sureties which is fairly to be understood, though not expressed in the section. Note

*For subsequent opinion see 75 P.2d 65.

LaFleur v. M. A. Burns Lumber Co. (1922) 188 Cal. 321, 205 P. 102. There is no indication that the summary remedy is intended to be exclusive; an independent action may doubtless be brought. 3 Am.Jur. pp. 775, 776.

We find no statutory justification for the order denying plaintiff's motion. The suggestion is made that because section 581a of the Code of Civil Procedure (as amended by St.1933, p. 1869) requires the dismissal of an action where, summons having been served and no answer filed, judgment is not entered within three years, that that should be the rule in such a case as ours. The answer to this suggestion we find to be obvious: the Code section referred to does not by its terms apply to this case and to make it do so would be judicial legislation in which we may not indulge.

It is argued more earnestly, further, that the motion that judgment be entered against the sureties was properly denied because of the limitations prescribed either by section 337 of the Code of Civil Procedure (as amended by St.1933, p. 2116), or by section 343 of the same Code. These two Code sections are introduced by the statement in the preceding section 335: "The periods prescribed for the commencement of actions * * * are as follows:" Then in section 337, supra, a four-year period is fixed for the bringing of actions upon an obligation or liability founded upon an instrument in writing, and in section 343, supra, a like term is named for "an action for relief not hereinbefore provided for."

While the word "action" as used in these Code provisions may well include a special proceeding of a civil nature (section 363, Code Civ.Proc.), even that broadening of the word does not bring the relief here sought by the plaintiff within the purview of our statute of limitations. In Hawley v. Gray Bros., etc., Co. (1900) 127 Cal. 560, at page 561, 60 P. 437, it was stated: "The entry of judgment against the sureties upon an appeal bond is not a special proceeding within the definition of section 23, Code Civ. Proc., but is a part of the procedure in the original action * * * and is in sequence of the judgment rendered therein." By executing their undertaking the sureties become, in legal effect, parties to the pending action. Meredith v. Santa Clara Min. Ass'n of Baltimore (1882) 60 Cal. 617; Hawley v. Gray Bros., etc., Co., supra, 127 Cal. 560, 60 P. 437; LaFleur v. M. A. Burns Lumber Co., supra, 188 Cal. 321, 205 P. 102. It follows that the Code limitations fixing the time within which actions may be brought do not apply.

However, because there is no time limit placed by statute upon the making of a motion for summary judgment, it does not follow that the motion can be made at any time, five, ten, or twenty years, after the right to have judgment entered has ripened. We find enough similarity between the right to enter judgment, given in an undertaking required by section 942, supra, and the right to have judgment entered given in voluntary contracts, so that the rule limiting the entry of judgments in the latter type of cases furnishes a guide in our case. As stated in the opening paragraph of an annotation on the subject in 21 A.L.R. 774: "It appears to be well established that a warrant of attorney to confess judgment on an obligation does not authorize a confession of judgment after an action on the obligation has become barred by a statute of limitation." Subsequent to the cases reviewed in the annotation, we find Gordon v. Heller (1935) 271 Mich. 240, 260 N.W. 156, and Williams v. Wilborne (1936) 170 Tenn. 289, 95 S.W.(2d) 41. In recognition of the adherence to this rule by the Illinois courts, an Illinois consent judgment, entered after the statute had run, was held invalid in First Nat. Bank v. Terry (1930) 103 Cal.App. 501, 285 P. 336. It is our opinion that a summary judgment may not be entered on an undertaking given pursuant to section 942, supra, after the statute has run, for the commencement of an independent action against the sureties.

We need not decide whether the governing statute is section 338 of the Code of Civil Procedure (as amended by St.1933, p. 878), naming three years as the term for an action on a liability created by statute, or section 337, supra; in either event the statute had run when plaintiff made its motion. The cause of action against the sureties is either created by statute or by written contract; it is not to be confused with the obligation of the principal which is on the judgment. See Gaffigan v. Lawton (1934) 1 Cal.(2d) 722, 37 P.(2d) 79.

The order appealed from is affirmed.

YORK, Justice (concurring).

I concur, for the reason that I believe the liability of the sureties was limited to a period of four years from the date of the incurrence or fixing of the liability under the terms of the written instrument. The

sureties as such became liable thirty days after the judgment in the original action became final, but appellant waited for more than four years after the sureties' obligation to pay under the terms of the written instrument became fixed, before attempting to enforce such liability. Therefore, I believe, under the authorities cited in the foregoing opinion, that the written instrument or bond became unenforceable after the expiration of the period of *four* years from the date that the sureties were obligated to pay the judgment, although the judgment itself would be enforceable against the principals, who were the original defendants in this case, for the full period of *five* years from the date it became final.

I dissent: HOUSER, P. J.

KEY NUMBER SYSTEM

UNION FLOWER MARKET, Limited, v. SOUTHERN CALIFORNIA FLOWER MARKET, Inc., et al. *

Civ. 11428.

District Court of Appeal, Second District, Division 2, California.

May 28, 1937.

Rehearing Denied June 17, 1937.

Hearing Granted by Supreme Court July 26, 1937.

1. Appeal and error ⇐516

The "proper record," duly authenticated, necessary to maintenance of appeal consists of either bill of exceptions, reporter's transcript of proceedings in lower court, or judgment roll (Code Civ.Proc. §§ 950–952, 953a–953c, and section 670, as amended by St.1933, p. 1883).

[Ed. Note.—For other definitions of "Record," see Words & Phrases.]

2. Appeal and error ⇐518(4)

A purported clerk's transcript which contains copy of complaint but not of complaint as amended by interlineation or of defendant's answer is not "judgment roll" under statute and hence not proper record on which to predicate appeal in absence of bill of exceptions or reporter's transcript of proceedings (Code Civ.Proc. §§ 950–952, 953a–953c, and section 670, as amended by St.1933, p. 1883).

[Ed. Note.—For other definitions of "Judgment Roll," see Words & Phrases.]

3. Appeal and error ⇐634

Where inspection of record discloses that no relief can be given to appellant on record, judgment will be affirmed.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by the Union Flower Market, Limited, against the Southern California Flower Market, Incorporated, and others. From the judgment, plaintiff appeals.

Affirmed.

Lorrin Andrews and Fred W. Heath, both of Los Angeles, for appellant.

J. Marion Wright, John Y. Maeno, Leonard Slosson, and Biby & Biby, all of Los Angeles, for respondents.

McCOMB, Justice.

This is a motion to affirm the judgment on the ground that appellant has failed to furnish this court a proper record.

The only record on file is a purported clerk's transcript containing a copy of:

(a) Plaintiff's complaint.

(b) Minute order granting judgment on the pleadings.

(c) Judgment.

(d) Notice of appeal.

(e) Notice to the clerk to prepare a transcript of the documents mentioned under headings (a), (b), (c), and (d).

This is the sole question presented for determination:

Has appellant prepared and filed in this court a proper record upon which to predicate its appeal?

[1] This question must be answered in the negative. After taking an appeal here, it is necessary to have prepared and filed a proper record. Such record duly authenticated consists of either:

I. Bill of exceptions (sections 950, 951, and 952, Code Civ.Proc.),

II. Reporter's transcript of the proceedings in the lower court (sections 953a, 953b, and 953c, Code Civ.Proc.), or

III. Judgment roll (section 670, Code Civ.Proc. as amended by St.1933, p. 1883).

[2] Neither a bill of exceptions, reporter's transcript, nor judgment roll has been furnished this court. The purported transcript set forth above cannot be considered as a judgment roll, since it does not meet the requirements mentioned in

*For subsequent opinion see 76 P.2d 503.

subdivision 2, section 670 of the Code of Civil Procedure as amended by St.1933, p. 1883. For example, that section requires that the judgment roll contain a copy of "the pleadings." The document filed here fails to include either a copy of the complaint as amended by interlineation or the answer of respondent thereto.

[3] The law is settled that, where as in this case, an inspection of the record discloses that no relief can be given to the appellant on the record before the court, the judgment of the lower court will be affirmed. Hibernia Savings & Loan Society v. Doran, 161 Cal. 118, 120, 118 P. 526.

For the foregoing reasons, the judgment is affirmed.

I concur: CRAIL, P. J.



21 Cal.App.2d 287

Ex parte McDONOUGH.

Cr. 1971.

District Court of Appeal, First District, Division 1, California.

June 7, 1937.

1. Grand Jury ⇐36

Even if evidence was obtained in unlawful manner, such fact was no objection to its use for purpose of investigation conducted before grand jury, and witness by answering questions based on such evidence would not be aiding or abetting an unlawful act, as regards question whether witness was guilty of contempt in refusing to answer questions.

2. Grand Jury ⇐37

Party being examined before grand jury has but status of a witness and can claim only privilege protecting witness from self incrimination.

3. Grand Jury ⇐36

Alleged fact that public officers have elsewhere accused witness of criminal practices did not excuse witness from answering questions asked by grand jury, particularly where he disclaimed privilege protecting witness from self incrimination.

Habeas corpus proceeding by Peter P. McDonough.

Petition for writ of habeas corpus denied.

See, also, 68 P.(2d) 1021.

John J. Taaffe, of San Francisco, for petitioner.

CASHIN, Justice.

A petition for writ of habeas corpus.

Petitioner avers that he is illegally restrained and deprived of his liberty by an order of the superior court in and for the city and county of San Francisco, adjudging him to be in contempt and committing him to prison. The order was based on his refusal to answer as a witness certain questions asked by the grand jury of said city and county. His refusal was not based upon the ground that his answers would tend to incriminate or degrade him, but that evidence tending to show criminal acts by certain police officers having been obtained through a telephone leading into petitioner's office (which method he alleges to have been unlawful), and the questions having been based on information so obtained, he would, should he answer, be aiding and abetting an unlawful use of such information; further, that none of the questions so asked was pertinent, relevant, or material to the investigation being conducted, and that the district attorney and his associates have caused and permitted statements to appear in the press and elsewhere charging the petitioner with being an accomplice in acts involving the police officers mentioned.

The proceedings as conducted, and the requirement that he answer, are claimed to have been violative of certain of his constitutional rights, and that as a consequence the superior court was without jurisdiction to make the order complained of.

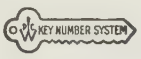
[1-3] If it be a fact that evidence was obtained in an unlawful manner, this is no objection to its use for the purpose of the investigation (People v. Mayen, 188 Cal. 237, 205 P. 435, 24 A.L.R. 1383; Herrscher v. State Bar, 4 Cal.(2d) 399, 49 P.(2d) 832); and petitioner, by answering the questions, would in no sense be aiding or abetting an unlawful act. Moreover, as held in Re Lemon, 15 Cal.App.(2d) 82, 59 P.(2d) 213—where, as here, a grand jury investigation is not a criminal proceeding but one for the purpose of determining whether any criminal proceeding shall be commenced—petitioner has but the status of a witness, and can claim only the privilege protecting

a witness from self incrimination. See, also, In re Hoertkorn, 15 Cal.App.(2d) 93, 59 P.(2d) 218. Nor would the fact that public officers have elsewhere accused petitioner of criminal practices excuse him, particularly where he disclaims the privilege mentioned.

The questions were relevant and material to the matter before the grand jury, as the superior court found; and in view of the facts and the cases cited, no ground for petitioner's discharge from custody has been shown.

The petition is denied.

We concur: TYLER, P. J.; KNIGHT, J.



9 Cal.2d 90

Ex parte McDONOUGH.

Cr. 4120.

Supreme Court of California.

June 10, 1937.

Habeas corpus ⇐53

Where no sufficient reason appeared which would justify issuance of writ of habeas corpus, petition therefor was denied.

In Bank.

Habeas corpus proceeding by Peter B. McDonough.

Petition for writ of habeas corpus denied.

John J. Taaffe, of San Francisco, for petitioner.

PER CURIAM.

Upon full consideration of the questions presented by the petitioner herein the court finds itself in full agreement with the decision and conclusion announced by the District Court of Appeal of the First Appellate District, Division 1, in the Matter of the Application of Peter P. McDonough, for a writ of habeas corpus, filed and entered in said court on June 7, 1937, 68 P.(2d) 1020. The grounds for the issuance of the writ are substantially the same in each case, and the cases and reasoning upon which the petition was denied by said District Court of Appeal applies with equal force to the petitioner in the instant case. No sufficient reason appearing which would justify the issuance of the writ, the petition is therefore denied.



24 Cal.App.2d Supp. 762

DEAN v. NIAGARA FIRE INS. CO. et al.

Civ. A. 3637.

Appellate Department, Superior Court, Los Angeles County, California.

May 28, 1937.

1. Appeal and error ⇐756

Court rule prohibiting quotations or extracts from record or from legal authority in appeal brief does not prevent submitting a detailed analysis of automatic coverage clause of policy or discussion of authorities in appeal in action on automobile indemnity policy (Judicial Council Rules, rule 5, § 3).

2. Insurance ⇐435

Under statutory provision that title to motor vehicle does not pass until transfer of registration and issuance of new certificate of ownership and registration card, owner or prospective owner of automobile is not prevented from validly contracting for insurance against perils of use dependent upon possession irrespective of status of registered ownership (St.1935, pp. 93, 118, § 186)

3. Insurance ⇐665(1)

Under automobile indemnity policy insuring against liability of owner occurring by reason of ownership of any automobile acquired by insured as "replacement" of automobile described in policy, as of date of delivery of "replacement," evidence that injury to third party occurred as insured was driving "replacement" automobile not yet registered in his name, but so registered subsequent to accident, was sufficient to support finding that automobile was "delivered" to insured within contemplation of policy, notwithstanding statutory provision that no delivery should be deemed made until transfer of registration, since term "delivery" as used in policy signified handing over of physical possession and control of automo-

bile (St.1935, p. 115, §§ 177–179; p. 118, § 186).

[Ed. Note.—For other definitions of "Deliver; Delivery" and "Replace; Replacement," see Words & Phrases.]

4. Appeal and error ⇐1064(1)
Jury ⇐12(1)

In action on automobile indemnity policy, plaintiff is entitled to jury trial as matter of right under Constitution, and misdirection of jury is prejudicial in that substantial right is taken away unless erroneous instruction is cured by other instructions or verdict rendered was only verdict which evidence would support.

5. Appeal and error ⇐1067

In action on automobile indemnity policy insuring against liability of owner occurring by reason of ownership of automobile acquired by insured as "replacement" of automobile described in policy as of date of "delivery" of "replacement," where injury occurred while driving alleged "replacement," failure to instruct that, if automobile driven by insured at time of accident belonged to another and was driven by insured to try it out with idea of possible purchase, verdict should be for insurer, which was only instruction directly covering insurer's duty on that particular assumption, entitled insurer to new trial where evidence was conflicting.

Appeal from Municipal Court of City of Long Beach, Los Angeles County; Fred Miller, Judge.

Action by Fred S. Dean against the Niagara Fire Insurance Company, and another. Judgment for plaintiff, and the Fidelity & Casualty Company of New York appeals.

Reversed and remanded.

Jennings & Belcher, of Los Angeles, for appellant.

James E. Pawson, of Long Beach, for respondent.

SCHAUER, Judge.

On September 12, 1935, plaintiff, who was then the owner of, and using in his business as a radio dealer and for pleasure, a certain 1934 Ford sedan automobile, negotiated with defendant Casualty Company, and said defendant wrote a contract of insurance indemnifying plaintiff against various perils including liability for personal injury arising out of the use of the described automobile or a replacement thereof. Plaintiff owned and operated other automobiles with respect to which he was not insured by said defendant, and he had one other policy written by such defendant, but the same is not connected with this litigation, which is founded solely upon an alleged breach of the indemnity contract first above mentioned and on which contract the said defendant Casualty Company, hereinafter sometimes referred to merely as defendant or appellant, is sole obligor. On December 4, 1935, plaintiff while driving a 1935 (sold as new January 6, 1936) Ford sedan was involved in an accident causing personal injury to a minor child resulting in litigation and an eventual cash settlement payment by plaintiff. Defendant upon demand having refused to provide for representation or defense of plaintiff in the personal injury action brought by the minor and having not reimbursed plaintiff for the expenses sustained or liability discharged by him, this action was brought to recover damages for such defendant's alleged breach of contract in the premises, and from the judgment therein for plaintiff upon the verdict, as reduced by the court, the said defendant, Fidelity and Casualty Company of New York, appeals.

[1] For the future guidance of counsel, their attention is directed to the fact that there is nothing in the rules of this court to prevent them from "submitting a detailed analysis of the automatic coverage clause of the policy, or any discussion of the authorities," as declared in Appellant's Opening Memorandum, at page 8.

The rule involved (section 3, rule 5 of Judicial Council Rules governing proceedings in the Appellate Department, Superior Court) provides: "The points and authorities shall state concisely and separately the propositions of both law and fact relied on by the parties, with references by page and line, if possible, to the parts of the record supporting such propositions of fact and citation of the authorities for such propositions of law, but shall not contain quotations or extracts from the record or from legal authorities. No briefs shall be filed except by permission of the court." While such rule directs that points and authorities shall not contain "quotations or extracts from the

record or from legal authorities," it manifestly does not, in letter or spirit, prohibit an adequate statement and analysis of the points to be presented, with the authorities supporting the same. Counsels' misapprehension of the rule, however, has not here perceptibly impeded an adequate presentation of their points.

[2, 3] Appellant urges first that the evidence is as a matter of law insufficient to support any judgment other than for defendant, in that it uncontradictedly appears that at the time of the accident out of which the liability arose plaintiff was driving an automobile (the 1935 sedan) which had not yet been registered, or reported to the motor vehicle department for registration, in his name, and that the 1934 sedan described in the policy remained registered as the property of plaintiff. Appellant cites various decisions, such as Schmidt v. C. I. T. Corp. (1936) 14 Cal. App.(2d) 92, 57 P.(2d) 1016, holding in effect that the liability of the registered owner of an automobile for negligence in its permitted use continues when it is placed in the hands of a putative purchaser until the formalities of transfer exacted of a transferror by the motor vehicle statute have been performed. Appellant argues that its responsibility as insurer in relation to the 1934 automobile was coextensive (within policy limits) with the liability of plaintiff as owner thereof and that the 1935 model did not "replace" the described 1934 car unless and until the registered title of the one had been transferred from, and that of the other to, the plaintiff. Such contentions cannot be sustained.

By the terms of the policy, liability of the insured is not the test for responsibility of the insurer. By the contract plaintiff was insured against the peril involved here if it was alleged to have occurred "by reason of the use, ownership, or maintenance of any automobile described in the declarations," and it was further provided that:

"Third—A. Such insurance as is afforded by this Policy to each and every automobile covered thereunder and owned by the Named Insured shall also apply during the policy period to any other automobile, ownership of which is acquired by the Named Insured, * * * *as of the date of delivery to him* * * *.

"(2) If the Company does not cover all automobiles owned by the Named Insured *at the date of such delivery,* the insurance shall be applicable only to such other automobile if it replaces an automobile described in this Policy * * *.

"(3) The insurance afforded by this Policy shall automatically terminate upon the replaced automobile *at the time of such delivery.*" (Italics added.)

Still further condensing and interpolating the foregoing language, but not altering its meaning in this case, we find that the material agreement is that "Such insurance as is afforded by this Policy to each * * * automobile * * * *owned* by the Named Insured shall also apply * * * to any *other* automobile, ownership of which is [sometime] acquired by the Named Insured, * * * as of the date [not of acquiring ownership but] of *delivery* to him," and that, "If the Company does not cover all automobiles owned by the Named Insured *at the date* [not of acquiring ownership but] *of such delivery,* the insurance shall be applicable only to such other automobile if it replaces an automobile described * * * and * * * shall automatically terminate upon the replaced automobile [not as of date dependent upon its transfer but] at the time of such delivery."

There is nothing in the policy to suggest or justify giving to the word "delivery" as used therein any meaning other than its ordinary one, which, in the context quoted, would signify a handing over of physical possession and control of the automobile. The fact that the Motor Vehicle Code (St.1935, pp. 93, 118) provides that (section 186), "No transfer of the title or any interest in or to a vehicle registered hereunder shall pass nor shall delivery of any said vehicle be deemed to have been made and any attempted transfer shall not be effective for any purpose until transfer of registration is made and the department has issued a new certificate of ownership and registration card," except as therein provided, does not prevent the owner or prospective owner of an automobile from validly contracting for insurance against perils of use dependent upon possession irrespective of the status of registered ownership. Golden Gate Motor Transport Co. v. Great American Indemnity Co. (1936) 6 Cal.(2d) 439, 445, 58 P.(2d) 374. Other sections of the Motor Vehicle Code (for examples see sections 177, 178, 179) mention delivery or transfer of possession of motor vehicles

in a de facto sense, and it is obviously in that sense that the reference is made in the policy here involved. We are satisfied that the evidence is legally sufficient to support the implied finding that prior to the accident described in the complaint the 1935 sedan had been "delivered" to plaintiff and that it had "replaced" *in his use,* as contemplated by the insurance contract involved herein, the 1934 automobile described therein. The evidence also establishes that plaintiff did acquire the legal status of registered owner of such 1935 model not later than January 10, 1936; having acquired ownership of the car the insurance protection thereon, by the terms of the policy above quoted, attached as of the date of delivery of possession whether that date was prior or subsequent to registration of title.

[4, 5] The foregoing discussion disposes of all points predicated upon appellant's interpretation of the policy as being controlled by provisions of the Motor Vehicle Code, but leaves entirely unanswered its assignment of prejudicial error in the failure of the court to give its requested instruction No. 8a, reading as follows: "If it was a fact that the automobile which plaintiff was driving at the time of the accident on December 4, 1935, belonged to H. O. Melone or the H. O. Melone Company and was being driven by plaintiff at the time of the accident simply to try the same out with an idea of its possible purchase, then your verdict shall be for defendant." Such quoted proposed instruction correctly advised the jury as to their duty upon the hypothesized facts and was the only proposed instruction which directly stated their duty upon such specific assumption. The evidence in the record before us would well have supported a finding for defendant upon the very point covered by the refused instruction, which point was not at all adequately covered by any instruction given. In view of the conflict in the evidence upon the precise point postulated, we are unable to infer that the same verdict would have been returned had such instruction been given. The defendant was entitled to the requested instruction, or one clearly embodying the substance of the rule stated therein, and failure to give either deprived it of a substantial right. Berkovitz v. American River Gravel Co. (1923) 191 Cal. 195, 199, 215 P. 675. "In a personal injury case [the rule is the same here] the plaintiff is entitled to a jury trial as a matter of right under the Constitution, and, if the jury is misdirected, we think this takes away a substantial right, and, unless the erroneous instruction was cured by other instructions, or the verdict rendered was the only verdict which the evidence would support, it would of course be prejudicial." Bieser v. Davies (1932) 119 Cal.App. 659, 664, 7 P.(2d) 388, 390. Under the circumstances appearing in the case at bar, the refusal to give the instruction requested was as much a deprival of right to appellant as was the giving of the erroneous instruction a denial of right to the appellant in the case last hereinabove cited. Under such circumstances defendant is entitled to a new trial.

Other errors complained of which are less consequential in effect, but which should not be repeated upon a new trial, include the giving of plaintiff's instructions No. 8, which is ambiguous and unintelligible, and No. 9, which is incomplete and suggestive of a greater burden upon defendant than may be properly charged to it, ignoring the duty to find for defendant in the event that the evidence seemed equally balanced. Whether the judgment upon the verdict as reduced by the court was still excessive as including an allowance for attorney's fees not shown to be reasonable in amount or to have been actually paid [see 8 Cal.Jur. 747; Willson v. McEvoy (1864) 25 Cal. 169; Prader v. Grimm (1865) 28 Cal. 11; Elder v. Kutner (1893) 97 Cal. 490, 495, 32 P. 563; Nelson v. Kellogg (1912) 162 Cal. 621, 623, 123 P. 1115, Ann.Cas.1913D, 759; Cook v. Terry (1912) 19 Cal.App. 765, 768, 127 P. 816; Soule v. U. S. F. & G. Co. (1927) 82 Cal.App. 572, 574, 255 P. 886], we need not here, and do not, decide as the same status of evidence and alleged excessive verdict thereon in respect to such item is not likely to appear upon another trial.

The judgment is reversed, and the cause is remanded to the municipal court of the city of Long Beach for a new trial; appellant to recover its costs of appeal.

SHAW, P. J., and SHINN, Judge pro tem., concur.

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